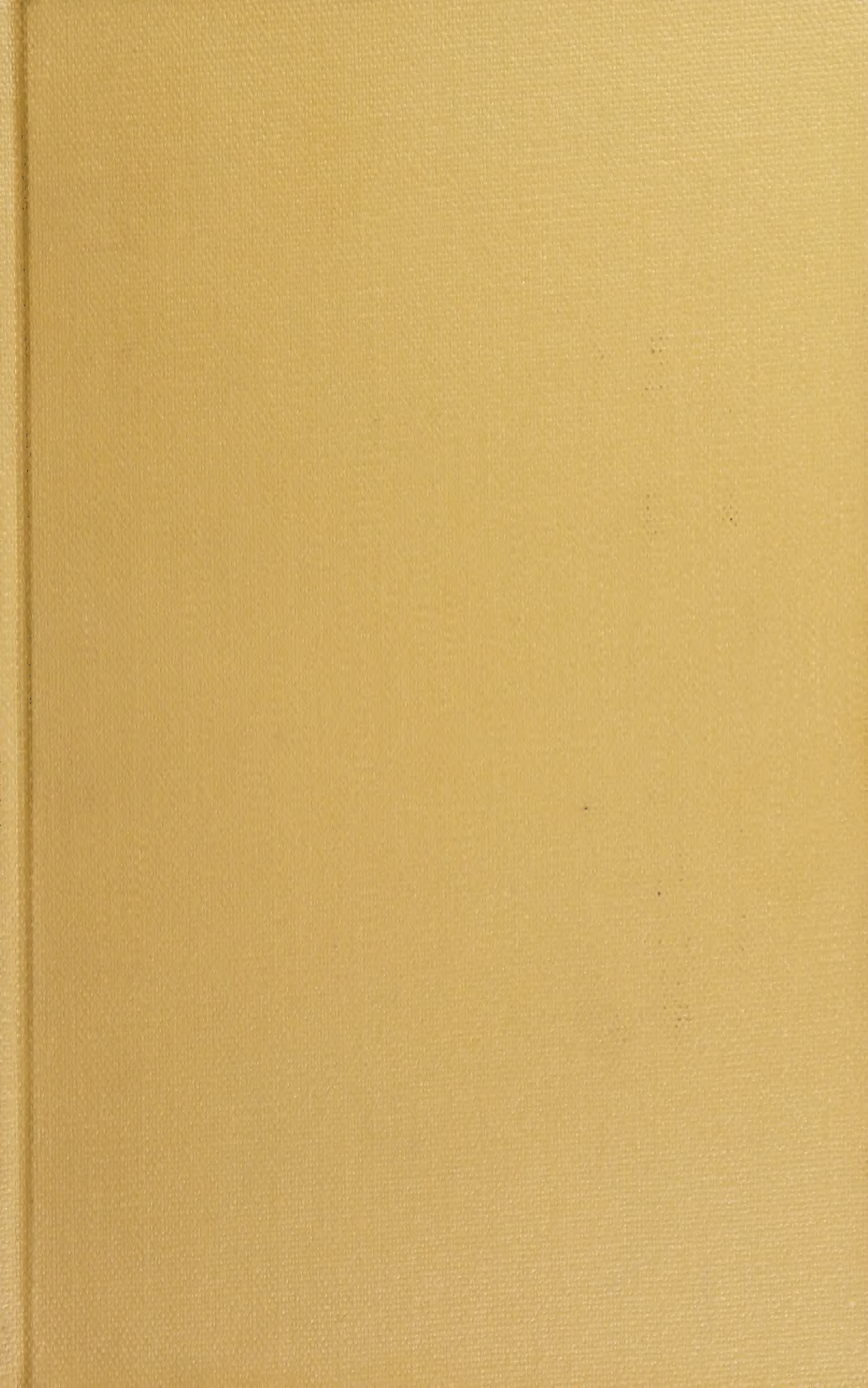
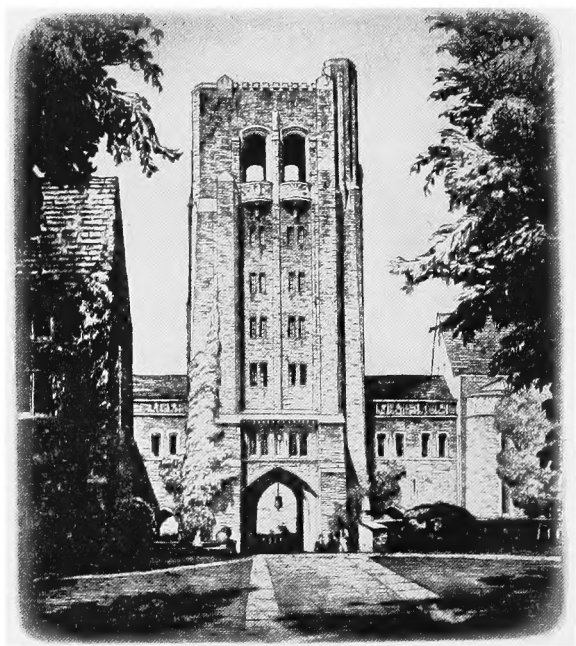
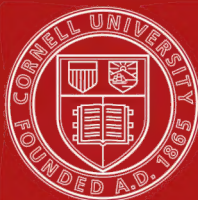






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A TREATISE
ON
THE LAW
OF
RECORD OF TITLE

OF REAL AND PERSONAL PROPERTY,

WITH APPENDIX GIVING THE STATUTORY PROVISIONS OF
THE SEVERAL STATES RELATING THERETO, AND
APPROVED FORMS FOR ACKNOWLEDG-
MENTS IN EACH STATE,

BY

BRITAIN R. WEBB,

AUTHOR OF "A TREATISE ON THE TEXAS CRIMINAL LAW," ETC.

ST. LOUIS, MO.:
THE GILBERT BOOK CO.
1890.

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TO THE HONORABLE

JAMES S. HOGG,

ATTORNEY-GENERAL OF THE STATE OF TEXAS,

IN TESTIMONY OF THE HIGH REGARD IN WHICH HIS WORTH AS A
MAN AND HIS SERVICES AS AN OFFICER ARE HELD,

THIS WORK IS INSCRIBED

BY THE AUTHOR.

PREFACE.

The matter of Registration of Title has been heretofore treated only as a branch of the general law of real and personal property, of conveyances, and of the doctrine of notice. With the growth of statutes and the multiplication of decisions, however, the subject has now reached an importance and bulk such as properly demands for it a separate work, and hence this book has been written.

The decisions arising under the recording acts have been well said to be "exceedingly numerous and often involving questions of great magnitude and importance." The statutes are being constantly extended, altered and modified by the legislatures of nearly fifty states and territories, and upon these numerous statutes, more or less variant from each other, many courts are adjudicating, so that to the growing diversities of legislation are added the increasing diversities of judicial decision; and with the result that out of the very large number of cases that have accumulated, conflicting, and apparently conflicting, opinions can now be arrayed on either side of nearly all the numerous questions that reasonably arise.

It is true that a common purpose and design pervades all of these registry acts, and that this conflict of decision is often more apparent than real, and can in many instances be reconciled by a careful comparison of differences in the underlying statutes, yet this helps but little to relieve the

matter of practical difficulty, as such investigation requires time and labor, and a readier access to the statutes and reports of the various states than attorneys ordinarily possess.

It is a matter of regret that there is to be found among the statutes of the several states as needless and vexatious a diversity as exists in respect to their registry laws, and one of the incentives to this work has been the hope that a collation and comparison of the decisions and statutes on the subject, such as is here presented, may aid to some extent in bringing about greater uniformity in our laws relating to the record of title. Throughout the work those statutes and decisions that tend toward simplicity and uniformity are pointed out as presenting the better law, whether supported or not by the greater weight of precedent.

The design of the work has been to state only general principles in the text, as far as this was practicable; and in the notes to give points of illustration and minor qualification, and decisions resting principally on special provision or phraseology of statute.

It may be thought that in some instances the citations of cases in the notes are needlessly full; but there are many states, and each lawyer or judge will prefer to find, in relation to any point worth examining, proper reference to at least one or two decisions by the courts of his own state. Care has been taken to avoid citing on any one point a needless number of cases from the same state. The parallel references to the American Decisions, the American Reports and the current series of the Reporter system, it is hoped will prove a convenience to the profession, and add to the practical usefulness of the work.

B. R. W.

BAIRD, TEX., Jan'y 1st, 1890.

TABLE OF CONTENTS.

CH. 1.—HISTORY AND GENERAL PRINCIPLES OF REGISTRATION.

	SECS.
1. The Early English and American Statutes.....	1-3
2. The American Theory and Conflict of Decisions..	4-5
3. Leading and Similar Features.....	6
4. Dissimilar Provisions.....	7-18
7. Time Allowed for Record.	
8, 9. Acknowledgments.	
10. Creditors.	
11. The <i>Lex Situs</i> .	
12. Actual Notice.	
13-15. Subsequent Deed to be First Recorded.	
16-18. Filing and Mistake in Recording.	
5. Extension of the Law of Registry.....	19, 20
20. Vendor's Lien as Affected by Registry.	
6. Record is Notice to All the World.....	21, 22
22. Limitations of the Rule.	
7. Validating Acts.....	23

CH. 2.—OF THE INSTRUMENTS ENTITLED TO RECORD.

1. Conveyances of the Legal Title.....	24-35
25. Patents.	
26, 27. Deeds and Quit-claims.	
28, 29. Leases and Powers of Attorney.	
30-32. Mortgages and Defeasances.	
33-35. Assignments, Releases and Trust Deeds.	
2. Conveyances of Equitable Title.....	36-39
37. Executory Contracts.	
38. Bonds for Title.	
39. Equitable Mortgages.	

	SECS.
3. Conveyances of Personal Property.....	40, 41
41. Chattel Mortgages.	
4. Special Statutory Instruments.....	42-47
42. Abstracts of Judgments.	
43. Notices of <i>Lis Pendens</i> .	
44. Attachment and Execution Liens.	
45-47. Mechanics' Liens.	
5. Miscellaneous Matters.....	48-51
49. Town Plats.	
50, 51. Record of Wills.	

CH. 3.—ACKNOWLEDGMENT.

1. Purpose and Effect of Acknowledgment.....	52-56
53, 54. Where and for What Not Required.	
55, 56. Requisite to Record and as Proof of Execution.	
2. By Whom to be Made.....	57-60
58. By One of Several Grantors.	
59, 60. By Agents and Officers of Corporations.	
3. Before What Officers to be Made.....	61-68
61-64. Deputies, <i>Ex-officio</i> and <i>De-facto</i> Officers.	
65, 66. Local Jurisdiction and Presumptions.	
67, 68. Disqualification by Interest and Relationship.	
4. The Certificate of Acknowledgment.....	69-86
70-72. Caption and Statement of Official Capacity.	
73, 74. Official Seal, and How Shown.	
75. Certificates of Magistracy and Conformity.	
76, 77. Identity of Grantor, and How Stated.	
78. Stating Grantor's Name.	
79, 80. Substantial Compliance with Statute.	
81, 82. Omissions, Material and Clerical.	
83. Surplusage.	
84, 85. Date and Signature.	
5. When and of What Certificate Conclusive.....	87-90
88, 89. How Far Conclusive—Fraud.	
90. Evidence Necessary to Overcome the Certificate.	
6. Amendment and Other Matters.....	91-97
92, 93. Amending Certificate—Married Women.	
94. Correction of Certificate by the Courts.	
95. Acknowledgment of Ancient Deeds.	
96. <i>Testimonios</i> and Public Acts of Sale.	
97. Validating Statutes.	

CH. 4.—ACKNOWLEDGMENT BY MARRIED WOMEN.

SECS.

1. Theory and Distinctive Features of the Law..98-102
 - 99-100. Distinctive Features and Modern Changes.
 - 101, 102. Early and Later Theories of the Law.
2. The Statutory Requisites.....103-110
 - 104, 105. The Separate Examination.
 - 106, 107. Explanation of the Deed.
 - 108, 109. The Voluntary Execution.
 110. The Wish Not to Retract.
3. Matters Relating to the Certificate.....111-115
 111. Substantial Compliance.
 112. Joint Certificates.
 113. Identity of the Wife.
 114. Community Property.
 115. Relinquishment of Dower.
4. Acknowledgment as Affected by Disabilities
of the Wife.....116-121
 - 116, 117. Deed with Blanks—Wife's Power of Attorney.
 118. Wife Acting as *Feme Sole*.
 119. Re-acknowledgment and Ratification.
 120. Validating Deeds of Married Women.
 121. Impeachment of the Certificate.

CH. 5.—PROOF BY WITNESSES.

1. Statutory Features.....122-124
 122. Proof Without Aid of Statute.
 123. General Features of the Statutes.
 124. Statutory Provisions.
2. Matters Affecting the Witness.....125-127
 125. Witnesses of Grantor's Selection.
 126. Proof by One when Statute Requires Two.
 127. Disqualifications of Witness.
3. Matters Affecting the Certificate.....128, 129
 128. The Affidavit and Certainty Required.
 129. Other Statutory Matters.
4. Proof of Handwriting.....130

CH. 6.—OF THE TIME, PLACE AND OTHER INCIDENTS OF RECORD.

	SECS.
1. Of the Allowance of Time for Record.....	131-133
131. Time of Record, Generally.	
132, 133. Statutory Time of Record.	
2. Of the Place of Record.....	134, 135
135. Records in the General Land Offices.	
3. Of the Books of Record.....	136-139
137-139. Record of Mortgage in Book of Deeds.	
4. Of Filing and Indexing.....	140-143
141. Filing and Withdrawing.	
142, 143. Indexing.	
5. Miscellaneous Matters.....	144-151
144. Delivery of the Deed.	
145. Witnesses Necessary to Record, when.	
146. Sealing and Signing.	
147. Description of the Property.	
148. Recording Officers.	
149. Schedules, Memoranda, etc.	
150. Manner of Record.	
151. Payment of Recording Fees.	

CH. 7.—THE EFFECT OF RECORD.

1. Constructive Notice by the Record.....	152-157
152. Effect of the Record.	
153. Definitions and Limitations.	
154. Purchaser Under Record Title Without Notice Protected.	
155. And May Convey to One Having Actual Notice.	
156, 157. When Record Title Does Not Protect.	
2. Break in the Record Title.....	158-161
159. Actual Notice as Supplying the Gap.	
160. Record of Mortgage Before that of Deed to Mortgagor.	
161. Exceptions Created by Estoppel.	
3. Limitations of Rule that Record is Notice...	162-164
162. Notice Only to Purchasers Under Same Grantor.	
163, 164. Not Notice to Prior Parties.	

	SECS.
4. Priority in Registration.....	165-170
166, 167. In Record of Conveyances from Same Grantor.	
168. In Conveyances of Same Date.	
169. Priority in the Record of Liens.	
170. Priority in Record of Mortgages.	
5. Record of Mortgages.....	171-175
172. Purchase Money Mortgages.	
173, 174. Re-inscription and Assignment of Mortgages.	
175. Cancellation and Discharge of Mortgages.	
6. Extent to which Record is Notice.....	176-191
177. Record as Notice of Matter of Law.	
178, 179. Recitals as Charging Notice.	
180. Imperfect and Ambiguous Recitals.	
181, 182. Recital to Other Instruments and to Mat- ters of Fact.	
183. Quit-claim Deed as Charging Notice.	
184. Purchaser from Heir Protected.	
185. Registry of Wife's Separate Property.	
186. Record of Conveyances by the Wife.	
187. Second Record Not Necessary.	
188. Registry as Affected by Usage.	
189. Record as Necessary to Validity of In- strument.	
190. Unauthorized Record Made Effectual by Subsequent Matters.	
191. Unrecorded Deeds as Affected by Suits.	

CH. 8.—CREDITORS AND SUBSEQUENT PURCHASERS.

1. Creditors at Common Law and Under the Statutes.....	192-196
192. Rights of Creditors at Common Law and in Equity.	
193, 194. Creditors Under the Statutes.	
195, 196. Must be Lien Creditors of the Grantor.	
2. Notice to Creditors and Purchasers.....	197-200
198. Notice Good if Before Judgment Obtained.	
199, 200. Notice to Purchaser Effectual, when.	
3. Purchaser Under the Recording Acts.....	201-203
202. <i>Bona Fide</i> Purchaser Defined.	
203. Purchaser of the Legal Title.	

	SECS.
4. What is Valuable Consideration.....	204-208
206, 207. Part Payment and Antecedent Debt.	
208. Extension of Time and the Like.	
5. Other Classes of Purchasers.....	209-214
209. Mortgagee a Purchaser.	
210. Trustee a Purchaser, when.	
211. Assignee for Benefit of Creditors Not a Purchaser.	
212. Purchaser at Execution Sale Protected.	
213. Purchaser at Bankrupt Sale Not Protected.	
214. Purchaser of Same Property from Same Grantor.	

CH. 9.—ACTUAL NOTICE.

1. Origin and Extent of the Equitable Doctrine..	215-222
215, 216. History and Prevalence of the Rule.	
217, 218. Exceptions to the Rule.	
219, 220. The Several Kinds and Degrees of Actual Notice.	
221. Constructive and Implied Notice.	
222. Statutory Distinctions as to Actual Notice.	
2. Putting on Inquiry.....	223-227
224. Sources of Information.	
225. Vague Statements and Rumors.	
226. Inquiry to be Prosecuted.	
227. Presumption of Notice Rebuttable.	
3. Possession as Notice.....	228-237
229. Exceptions to the Rule.	
230, 231. Grantor Remaining in Possession.	
232. Possession Referred to Recorded Title.	
233, 234. Possession to be Open, Notorious and Actual.	
235, 236. Joint Possession—Tenants in Common.	
237. Possession Must be Existing and Continuous.	
4. Notice to Agent is Notice to Principal.....	238-244
239. Scope of the Rule—Partners, etc.	
240. Character of the Agency.	
241. Notice in Same Transaction.	
242. Notice to an Agent for Both Parties.	
243. Where Agent is Guilty of Fraud.	
244. Notice to Officers and Agents of Corporations.	

CH. 10.—PERSONAL PROPERTY.

	SECS.
1. General Principles.....	245, 246
246. Statutory and Other Distinctions.	
2. Possession as Notice.....	247-251
248. As Affording Protection to Subsequent Purchaser.	
249. Conditional Sales—General Rule.	
250. Continued — Subsequent Purchaser Protected.	
251. Statutory Registry of Conditional Sales.	
3. Chattel Mortgages.....	252-274
253, 254. Description of Property, Filing, etc.	
255, 256. Time of Record—Withdrawal from Files.	
257-260. Re-filing and Affidavit of Renewal.	
261, 262. Place of Record—Non-residents.	
263, 264. Residence of Corporation and of Partnership.	
265, 266. Removal of Property and Re-record.	
267, 268. Removal—Comity of States— <i>Lex Situs</i> .	
269, 270. Actual Notice—Creditors, How Affected.	
271. Affidavit of Good Faith.	
272. Recorder's Certificate of Filing.	
273, 274. Mortgages of Growing Crops.	
4. Conveyances and Mortgages of Vessels.....	275, 276
276. Federal and State Laws on the Subject.	

CH. 11.—STATUTORY PROVISIONS OF THE SEVERAL STATES.

TABLE OF CASES.

INDEX.

RECORD OF TITLE.

CHAPTER 1.

HISTORY AND GENERAL PRINCIPLES OF REGISTRATION.

- §1. The early English statutes.
2. Extent of the English statutes and doctrine.
3. Early American statutes.
4. The American theory.
5. Conflict of decisions.
6. Leading and similar features.
7. Time allowed for recording.
8. Acknowledgment as a prerequisite to registry.
9. Acknowledgments of married women.
10. Rights of creditors.
11. *Lex situs*—Comity of states.
12. Actual notice as supplying registry.
13. Subsequent deed required to be first of record.
14. Continued—Equity of the matter.
15. Continued—The contrary doctrine.
16. Filing, and mistake in recording.
17. Continued—Record does not impart the notice.
18. Continued—Reason of the rule.
19. Extension of the law of registration.
20. Vendor's lien as affected by registry laws.
21. Record notice "to all the world."
22. Continued—Limitations of the rule.
23. Validating acts.

§1. The Early English Statutes.

At common law there was no obligation to put upon record a conveyance affecting the title to land.¹ The earliest English statute having any relation to the matter is that of

¹ *Aubuchan v. Bender*, 44 Mo. 564; *Clark v. White*, 12 Pet. 178.

27 Henry VIII, ch. 16, providing for the enrollment of bargains and sales. This statute was designed to give to purchases the notoriety formerly attained by livery of seizin, and was essential to the validity of the deeds.¹ It was not, however, a statute of registration, although declared to be analogous to it,² and has not prevailed in this country.³ The statute of 7th Anne, chap. 20, for the county of Middlesex, is one of the earliest of the registry acts. It provided: "That a memorial of all deeds and conveyances which, after the 27th of September, 1709, shall be made and executed, and of all wills and devises in writing, whereby any honours, manors, lands, &c., in the county of Middlesex, may be any way affected in law or equity, may be registered in such manner as is after directed; and that every such deed or conveyance that shall, at any time after, &c., be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim," &c.⁴

§2. Extent of the English Statutes and Doctrine.

It will be observed that the foregoing act does not by its terms give to the registration of conveyances the force and effect of notice, nor does the doctrine of constructive notice, as imparted from the record alone, even yet obtain in England,⁵ although in Ireland the rule is different, under a sep-

¹ 3 Wash. on Real Prop. (3d ed.) 281; *Pyle v. Maulding*, 7 J. J. Marsh. 204.

² *LeNeve v. LeNeve*, Amb. 436; s. c. 1 Ves. 64; 3 Atk. 646.

³ *Chandler v. Chandler*, 55 Cal. 267; *Welsh v. Foster*, 12 Mass. 96; *Given v. Doe*, 7 Blackf. 210.

⁴ *LeNeve v. LeNeve*, *supra*; s. c. in 2 Eq. Lead. Cas. (White & Tudor), 4 Am. ed. 113-117.

⁵ *Morecock v. Dickens*, Amb. 678; *Underwood v. Lord Courtown*, 2 Sch. & L. 40; *Bushell v. Bushell*, 1 *Id.* 90; *Wiseman v. Westland*, 1 Younge & J. 117; *Ford v. White*, 16 Beaver, 120; *Hodgson v. Dean*, 2 Sim. & St. 221.

arate and somewhat different act.¹ Neither does the English act declare that the subsequent purchaser shall be a purchaser without notice, but the doctrine that actual notice should be equivalent to registry was engrafted on the statute by the courts of equity at an early date, and is now of almost universal application.² The registry laws of England relating to deeds are even yet very limited in local application, extending only to three or four counties.³ The transfer of lands in England is less frequent than here, and the landholders of that kingdom have so far successfully resisted a general introduction of any system of recording conveyances, doubtless from a desire to withdraw settlements and domestic arrangements from public view.⁴ The registry acts of Great Britain are so essentially different from ours in their scope and operation that the decisions of the English courts, except as to the equity doctrine of notice in fact, actual or implied, shed but little light on the subject of this work.

§3. Early American Statutes.

In the United States the system of registration flourishes in its fullest vigor, and its history in this country antedates even the statute of 7th Anne. The usage of recording

¹ *Bushell v. Bushell*, 1 Sch. & L. 90, 103; *In re Driscoll*, 1 I. R. Eq. 285; *Latouche v. Lord Dunsany*, 1 Dr. & War. 459; *Drew v. Norbury*, 3 Jo. & Lat. 267; *Wade on Notice*, §107.

² *Mackreth v. Symmons*, 15 Ves. 349; *Potter v. Sanders*, 6 Hare, 1; *Blades v. Blades*, 1 Eq. Cas. Abr. 358, pl. 12; *LeNeve v. LeNeve*, *supra*; *Story's Eq. Juris.* §398; 2 *Pomeroy's Eq. Juris.* §591; *Wade on Notice*, §§48-50; 2 *Devlin on Deeds*, §725; *White v. Foster*, 102 Mass. 375; *Bonner v. Stephens*, 60 Tex. 616; *Dunham v. Dey*, 15 Johns. 555; s. c. 8 Am. Dec. 282; *Maybee v. Moore*, 90 Mo. 340; s. c. 2 S. W. Repr. 471; *Hilton v. Young*, 73 Cal. 684; s. c. 14 Pac. Repr. 684; *Otis v. Payne*, 86 Tenn. 663; *Marier v. Lee*, 2 Utah, 460; *Strohm v. Good*, 113 Ind. 93; *post*, §§215-244.

³ 4 *Kent's Com.* (12 ed.) *459.

The English Registry Acts are: For Middlesex, 7 Anne, ch. 20; West Riding of Yorkshire, 5 Anne, ch. 18; East Riding of Yorkshire and Kingston on Hull, 6 Anne, ch. 35; North Riding of Yorkshire, 8 George II, ch. 6; Irish Act, 6 Anne, ch. 2.

⁴ 3 *Washburn on Real Prop.* (3 ed.) 281.

deeds prevailed in New England from its earliest settlement. In Plymouth colony conveyances were by law required to be recorded as early as 1636; in Massachusetts in 1641;¹ in Connecticut, 1639;² in New Jersey, 1676;³ in North Carolina,⁴ Maryland and Pennsylvania, 1715; in Georgia, 1755;⁵ in Virginia⁶ from the earliest period.⁷ The scope and operation of the law of record has been constantly extended by legislative enactment so as to embrace nearly every species of property, and especially every kind of written instrument relating to real estate; while the courts, as a rule, have steadily favored the policy of the law, declaring that the registry acts impose no hardship, operate alike on all, make titles secure, and prevent frauds and litigation.⁸

§4. The American Theory.

The doctrine that actual notice shall supply the place of registration is now expressly declared in nearly all of the state statutes; but even where this is not the case, the courts almost universally recognize the rule as law.⁹ In all the states registration is held to impart constructive and absolute notice of the contents of every instrument that is

¹ Holmes' Annals, i. 261.

² Trumbull's History of Conn. 111.

³ Leaming & Spicer's New Jersey Collections, 153; *Read v. Richman*, 1 Green, 49.

⁴ *Hogan v. Strayhorn*, 65 N. C. 279. As to New York, see *Hunt v. Thompson*, 19 N. Y. 279; *Jackson v. Chamberlain*, 8 Wend. 620.

⁵ *Delancey v. McKean*, 1 Wash. C. Ct. 525; *Cobb's Dig. Laws of Ga.* (1851), p. 159.

⁶ Baylies' Hist. Memoirs, i. 112, 239.

⁷ 4 Kent's Com. (12th ed.) *456, notes.

⁸ *Moore v. Thomas*, 1 Or. 201; *Parkhurst v. Alexander*, 1 Johns. Ch. 394; *Fort v. Burch*, 6 Barb. 60; *Kelly v. Calhoun*, 95 U. S. 710; *Nat'l Bank v. Conway*, 1 Hughes C. Ct. 37; *Kenyon v. Stewart*, 44 Pa. St. 179; *Tarpley v. Hamer*, 9 Sm. & M. 310.

⁹ *Wyatt v. Barwell*, 19 Ves. 439; *Strohm v. Good*, 113 Ind. 93; *Ford v. White*, 16 Beav. 120; *White v. Foster*, 102 Mass. 375; *Smith v. Prof-fatt*, 82 Va. 832, 851; *Brown v. Hanauer*, 48 Ark. 277; *Maupron v. Emmons*, 47 Mo. 304; *Leinman's Estate*, 32 Md. 325; *post*, ch. ix. Actual notice does not supply registry in Louisiana. *Payne v. Pavey*, 29 La. Ann. 116; *Tulane v. Levinson*, 2 La. Ann. 787.

properly recorded, to every person subsequently dealing with the property, whose duty it is to examine the record.¹ The comparatively low value of land in this country, its frequent transfers, and the often widely scattered situations of its owners, have all tended strongly from the beginning towards a system of public records as the full and authentic source of information of title; and since inconsistent methods cannot exist together to advantage, our whole system of land titles and conveyancing has now for many years rested upon the plan and policy of registration.² Having become the dominant idea and prevailing practice, all other methods and theories in conflict with it have been dispensed with, or properly subordinated to it; its usefulness has been augmented, and its scope broadened and extended to include every species of property and interest to which the system of registry can be applied consistently with the principles of equity and a satisfactory transaction of practical business. To effectuate its purposes, the policy of the law is to compel the registration of every instrument and interest that can properly be recorded, for the protection of the rights not only of the party recording, but also the interests of all other persons subsequently dealing, or about to deal, with the property;³ and it is also its policy that such other persons shall have the right to rely upon the records as containing a full exhibit of every existing and outstanding estate, title or interest in the property that could affect their rights as *bona fide* purchasers thereof.⁴ This is the

¹ Blatchley v. Osborne, 33 Conn. 226; Buchanan v. Int. Bank, 78 Ill. 500; Parkhurst v. Alexander, 1 Johns. Ch. 394; Schutt v. Large, 6 Barb. 373; 1 Story's Eq. Juris. §403; Wells v. Smith, 2 Utah, 39.

² Womble v. Battle, 1 Ired. Eq. 186.

³ U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; Digman v. McCollum, 47 Mo. 372; Bellas v. McCarty, 10 Watts, 13; Wells v. Smith, 2 Utah. 39; McPherson v. Rollins, 107 N. Y. 316; s. c. 1 Am. St. Rep. 826; 14 N. E. Repr. 411; Voorhis v. Westervelt, 43 N. J. Eq. 642; s. c. 3 Am. St. Rep. 315; 12 Atl. Repr. 533; *post*, §152.

⁴ 2 Pomeroy's Eq. Juris. §649; Barrett v. Barrett, 31 Tex. 348; Ohio L. Ins. Co. v. Ledyard, 8 Ala. 866; Peychaud v. Citizens Bank, 21 La. Ann. 262; Harang v. Plattsmier, *Id.* 426; Bird v. Dennison, 7 Cal. 297;

theory of the legislation, and the courts, as a rule, have in their judicial interpretation of it sought to give effect to this general design.¹ The purpose of registry has been by the courts declared to be: (1) to preserve the muniments themselves of titles; (2) to perpetuate the evidence of their voluntary execution; and (3) to give the community notice of the changes in the ownership of property; and the laws to effectuate these objects are said to be founded on large grounds of public policy.²

§5. Conflict of Decisions.

Yet while this general theory and intent substantially prevails in the legislation and judicial decision of all the states, there is a noticeable want of harmony in many important particulars, and as to a few of even the leading principles, there is a positive conflict that will be difficult to reconcile without the aid of further legislation, based upon a somewhat broader statesmanship and a more thorough comprehension of the subject than seems to have yet prevailed in some localities.³ Each state has, as a rule, legis-

McCabe v. Grey, 20 Cal. 509; *Grant v. Bissett*, 1 Caines Cas. 112; *Jackson v. Given*, 8 Johns. 137; *Jackson v. VanValkenburgh*, 8 Cow. 260; *Cook v. Travis*, 20 N. Y. 400; *Taylor v. Thomas*, 5 N. J. Eq. 331; *Buchanan v. International Bank*, 75 Ill. 500; *Earle v. Fisk*, 103 Mass. 491, 494; *Routh v. Spencer*, 38 Ind. 393; *Holbrook v. Dickinson*, 56 Ill. 497; *Hogden v. Guttery*, 58 Ind. 431; *Harrington v. Allen*, 48 Miss. 493.

¹ See *Philbrook v. Delano*, 29 Me. 414; *Bayley v. Greenleaf*, 7 Wheat. 46; *Barrett v. Barrett*, 31 Tex. 344; *Acer v. Westcott*, 46 N. Y. 384; s. c. 7 Am. Rep. 355; *Sowden v. Craig*, 26 Iowa, 156; s. c. 96 Am. Dec. 125.

² *Yerger v. Young*, 9 Yerg. 37; *Ruggles v. Williams*, 1 Head, 141; *Sanders v. Harris*, 5 Humph. 343.

³ In construing the registry acts, two different considerations have contended for the mastery; sometimes the one prevailing, and sometimes the other. The first is, that these acts are intended to prevent fraud, are beneficial in their operation, and hence are to be liberally construed. This view is sustained by the cases cited in the preceding section. The other view is that these acts are in derogation of the common law, are purely statutory in all their features, and are to receive a strict construction—such an one as demands an almost literal compliance with the statute. See *Hawkins v. Burress*, 1 Har. & J. 513; *Boykin v. Rain*, 28 Ala. 332; s. c. 65 Am. Dec. 349; *Hitz v. Jenks*, 123 U.

lated upon the subject without reference to the laws of other states, and with the result that scarcely any two of the recording acts are alike. Since registration is a matter dependent entirely upon the statute, the force and effect of a difference in the statutory terms employed is greater than it would otherwise be; and to this diversity is due in a large measure the confusion and the apparent conflict of decision that may be found. In the exposition and application of the principles of registration much of this conflict of decision is apparent rather than real; and it may be further remarked that, aside from differences in the specific terms of the statutes, this conflict among the courts may be largely attributed to a general difference in the structure and scope of the several statutory systems, such as to influence a difference in the rules of construction to be applied. A knowledge of the statutes, at least as to their leading features of similarity and dissimilarity, is essentially necessary to a proper understanding of the American law of registration.¹

§6. Leading and Similar Features.

In every state, as already mentioned, registration is held to impart constructive and absolute notice of the contents of instruments authorized by law to be recorded.² This leading principle of the American registry law proceeds on the theory that one who willfully omits to inform himself of what the public records place within reach of his

S. 298; s. c. 8 Sup. Ct. Repr. 143; *Wetmore v. Laird*, 5 Biss. 160; *Merritt v. Yates*, 71 Ill. 639; *Dewey v. Campau*, 4 Mich. 565; *Rice v. Peacock*, 37 Tex. 392.

¹ See 2 Pomeroy's *Eq. Juris.* §646, and notes thereto; also *Stimson's Am. Stat. Law*, §§1570-1632, and the last chapter of this work. Some of the most essential differences in the law relate to the rights of creditors, to conveyances by married women, the doctrine of actual notice, and to priority in registration.

² *Edwards v. Barwise*, 69 Tex. 84; s. c. 6 S. W. Repr. 677; *Stevenson v. Morse*, 17 N. H. 532; *Van Rensselaer v. Clark*, 17 Wend. 25; *Thomas v. Kennedy*, 24 Iowa, 397; *Shore v. Lascar*, 22 Wis. 142; *Irvin v. Smith*, 17 Ohio, 226; *Cushing v. Ayer*, 25 Me. 383; *James v. Morey*, 2 Cow. 216.

knowledge, is not less chargeable with notice than if he knew. He should not be allowed to profess ignorance of a deed duly registered, and whether he examines the registry or not, the presumption against his good faith is equally strong. The rule was established on this basis in some of the states by judicial decision and in others by legislation.¹ So, in all the states, with but limited exception, actual notice, meaning here notice other than that imparted by the record, supplies the place of registration, although, as will be seen hereafter, there is some conflict and confusion as to the character and extent of the notice that will suffice for this purpose.² It is also the universal rule that, although the language of the statute may be permissive only, registration, as relating to real estate, is held to be mandatory in the sense that a failure to record gives to subsequent parties dealing with the property in good faith a superior right.³ The few limitations of this rule, relating to special classes of instruments, and the rule as relating to personal property, will be noticed hereafter.⁴ In all the states the record of an instrument affecting land must be made in the county where the land lies, excepting that in some of the western states having counties yet unorganized, special provision is made for such counties.⁵ Everywhere a subsequent purchaser for valuable consideration and without notice is protected by the registry acts; but as to creditors and other classes the rule is not so universal. These are all the leading principles in reference to which it can be said that the laws

¹ 2 Lead. Eq. Cas. (4 Am. ed.) 203; *Martin v. Sale*, 1 Bailey's Eq. 1; *Mann v. Martin*, 4 Md. 124; *Parkhurst v. Alexander*, 1 Johns. Ch. 394; *Keiser v. Houston*, 38 Ill. 252.

² See, *post*, ch. IX; *Wade on Notice*, §§1-10; 2 *Devlin on Deeds*, §§725-728; 2 *Pomeroy's Eq. Juris.* §§592-595.

The rule that actual notice supplies registry does not obtain in Louisiana. *Payne v. Pavey*, 29 La. Ann. 116, 117; and as to mortgages, this is the case in several other states. See, *post*, §§214-17.

³ *Neslin v. Wells*, 14 Otto (104 U. S.) 428.

⁴ See, *post*, §39, and ch. X.

⁵ *Stimson's Am. Stat. Law*, §1614; *Adams v. Hayden*, 60 Tex. 223; 2 *Sayles' Tex. Stats.* §4333; *post*, ch. VI; also note on p. 16.

of the states are substantially in accord with each other. In other respects the statutes and decisions are not always in harmony, though in some instances there is a decided weight of authority and precedent one way or the other.

§7. Time Allowed for Recording.

The statutes of several states and territories provide in effect that instruments recorded within a specified time after their execution shall have priority over any instrument of later date.¹ In such cases the record, when made within the prescribed time, relates back to the date or delivery of the instrument, and gives priority over a subsequent instrument, though it may already be on record.² The instrument, when recorded after the prescribed time, operates as notice only from the date of the filing and recording.³ Mortgages, if accorded the privilege of time at all, usually have a more limited period than is prescribed for deeds.⁴ The period of time within which deeds may be recorded varies from five days in Oregon,⁵ to one year in Georgia⁶ and other states, and formerly two years in North Carolina. This difference, and the further fact that in more than two-thirds of the states no such provision as to time exists at all, indicates at once what a fuller consideration demonstrates to be true, namely: that this privilege is a feature pertaining to the law of registration, having no substantial basis of merit

¹ See, in chapter 11, *post*, the statutory laws of Alabama, Georgia, Indiana, Kentucky, Maryland, New Jersey, Oregon, Pennsylvania, South Carolina and Virginia.

² *Betz v. Mulin*, 62 Ala. 365; *King v. Fraser*, 23 S. Car. 543; *Dale v. Arnold*, 2 Bibb. 605; *McConnell v. Brown*, Lit. Select Cases, 462; *Breckinridge v. Todd*, 3 Mon. 54; *Claiborne v. Holmes*, 51 Miss. 146; *Phelps v. Barnhart*, 88 N. C. 333.

³ *Anderson v. Dugas*, 29 Ga. 440; *Hand v. McKinney*, 25 Ga. 648; *Meni v. Rathbone*, 21 Ind. 454; *Steele v. Mansell*, 6 Rich. 437; *Mallory v. Stodder*, 6 Ala. 801. This rule does not always hold good as to chattel mortgages. *Briggs v. Fleming*, 112 Ind. 313; *S. Car. 14 N. E. Repr. 86*; *Simner v. Bible*, 43 Ind. 230; *Drew v. Streeter*, 137 Mass. 460; *post*, §254.

⁴ See, *post*, §29, and statutory provisions in the last chapter.

⁵ Gen'l Laws of Oregon (1872), ch. 6, §26.

⁶ Code of Georgia (1882), art. 2705.

underlying it. A century since such provision doubtless had some justification in certain localities, arising from the want of public mails and other facilities for early communication, and it is now perhaps suffered to remain on the statutes in deference to ancient custom. It operates as a practical cessation and withdrawal of the protection afforded to third parties by the registry laws for the period of time prescribed, and as this period begins from the date of an instrument that is entirely unknown to a *bona fide* subsequent purchaser or incumbrancer, it follows that, however clear the record may be at the time his right accrues, his purchase, though made upon valuable consideration and without any notice whatever, is liable until the expiration of the prescribed and, to him, unknown period of time, to be supplanted and overridden by another and secret conveyance, of which he had neither actual nor constructive notice. In certain localities, and as to a limited class of instruments, a privilege or preference for record of the entire day upon which the instrument was executed, is extended by statute,¹ and such statutes have a substantial reason in their favor. This subject is presented in detail in a succeeding chapter.²

§8. Acknowledgment as a Prerequisite to Registry.

Heretofore the law has been almost without exception that an acknowledgment has been required to entitle a deed to be recorded.³ Latterly, however, the rule has been

¹ 17 Biennial Laws of Del., 213, §4:

² Chap. 5. In Louisiana, a mechanic's lien or other privilege, as against a mortgage already of record, must be recorded on the day the contract is entered into, in order to have preference; *Gay v. Bovard*, 27 La. Ann. 290; but record of the privilege at any time is good as against a mortgage subsequently recorded. *McIlvaine v. Legare*, 34 La. Ann. 923; and against third parties without lien. Succession of *Clay*, 34 *Id.* 1131.

³ *Craddock v. Merrill*, 2 Tex. 495; *Bank v. Neal*, 28 W. Va. 744; *Taylor v. Harrison*, 47 Tex. 454; s. c. 26 Am. Rep. 304; *Stevens v. Hampton*, 46 Mo. 404; *Work v. Harper*, 24 Miss. 517; *White v. Denman*, 1 O. St. 110; *Dussaume v. Burnett*, 5 Iowa, 95; *Greenwood v. Jenswold*, 69 Iowa, 53; s. c. 28 N. W. Repr. 433; *Hitz v. Jenks*, 123 U. S.

broken in upon by statute in several instances. A confusion of statutes, as to the officers authorized to take acknowledgments, together with the requirement that the certificate thereof shall comply almost literally with various forms prescribed, has served in a multitude of instances to defeat the record, and, as to married women, to defeat the conveyances, as well as the record;¹ and has brought up for adjudication much the larger number of cases on registration that have been before the courts. That an undue importance and consequence has been attached to this matter of acknowledgment cannot be gainsaid. It is even yet usually cumbered with a number and extent of requirements which, while serving no substantial purpose, occasion in a large proportion of cases an entire failure to accomplish the object for which the recording laws are designed. A change, however, is already being made in this matter, and now the statutes of several states dispense with the acknowledgment as a prerequisite to registration, or to the effect of the record as imparting notice.² In a yet larger number of states the matter of acknowledgments has been much simplified, the separate examination of married women has been dispensed with, and the general form of certificate has been much improved. Thus, in more than one jurisdiction, it is now provided by statute that a certificate of

298; s. c. 8 Sup. Ct. Repr. 143; *Schultz v. Moore*, 1 McLean, 520; *Barney v. Sutton*, 2 Watts, 31; *Hastings v. Vaughan*, 5 Cal. 315; *Johns v. Scott*, 5 Md. 81; *Pope v. Henry*, 24 Vt. 560; *Chouteau v. Jones*, 11 Ill. 300; *Fleming v. Ervin*, 6 W. Va. 215; *Ely v. Wilcox*, 20 Wis. 523; s. c. 91 Am. Dec. 436; *Stevens v. Morse*, 47 N. H. 532; *Hodgson v. Butts*, 3 Cranch, 140; *Summer v. Rhodes*, 14 Conn. 135; *Heister v. Fortner*, 2 Binn. 40; *Brown v. Lunt*, 37 Me. 423; *Edwards v. Brinker*, 9 Dana, 69; *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772.

¹ See, *infra*, §9, and ch. 4.

² *Hurd's Rev. Stats. of Ill.* (1883), ch. 30, §31; *Genl. Stats. of Colorado* (1883), §217; *Rev. Stats. of Conn.* (1875), title 18, ch. 6, §13; *Code of Wash. Ter.* (1881), Art. 2323; *Code of Ala.*, art. 2153; *Simpson v. Mundee*, 3 Kan. 172. See *Meskerman v. Day*, 35 Kan. 46; s. c. 10 Pac. Repr. 14; *Sanford v. Weeks*, 38 Kan. 319; s. c. 16 Pac. Repr. 465; *Dinkins v. Moore*, 17 Ga. 64; *Code of La.*, §2253; *Stallcup v. Pyron*, 33 La. Ann. 1249; *Stebbins v. Duncan*, 108 U. S. 32; *Howell's Annotated Stats. of Mich.*, art. 5727.

acknowledgment is sufficient if it states that the grantor in the instrument, whether a married woman or otherwise, appeared before the proper officer and "acknowledged the same."¹ Where registration is invoked as a substitute for proof of the execution of the instrument as at common law and in suits before the courts, an acknowledgment is with more reason demanded, and for this purpose is yet required in those states that have dispensed with it, so far as notice by the record is concerned.²

§9. Acknowledgments of Married Women.

At common law the civil existence of the wife was considered as merged in that of the husband, and her freedom of will as having, therefore, measurably ceased to exist, and hence a process by fine and recovery in the courts was deemed necessary to secure such an expression of her will as would render a conveyance by her the act of herself and not of the husband alone.³ This theory has been continued in the modern law and practice by substituting a privy examination for the process by fine and recovery,⁴ and until a recent period such privy examination, with certificate thereof, has been almost universally required in the American states.⁵ It has been, and is yet, the established construction of the courts, that unless the law as to the acknowledgment of married women is strictly complied with, and the certificate shows this to have been done, the title does not pass, even as between the parties to the

¹ Rev. Stats. Wisconsin (1878), §2217. This is the form in W. Va., except for married women. Kelly's Rev. Stats. (1878), ch. 65, §3.

² See authorities in note 2 on preceding page.

³ 3 Wash. on Real Prop. 281; 2 Kent's Com. 129, 132, 163; Martin v. Dwelly, 6 Wend. 9; s. c. 21 Am. Dec. 245; Butler v. Buckingham, 5 Day, 492; s. c. 5 Am. Dec. 174.

⁴ Morris v. Sargent, 18 Iowa, 199; Proffat on Notaries, 40; Martin v. Dwelly, *supra*; Hitz v. Jenks, 123 U. S. 298.

⁵ Schley v. Pullman Car Co., 120 U. S. 575; Davis v. Agnew, 67 Tex. 206; s. c. 2 S. W. Repr. 43, 376; Pickens v. Kniseley, 29 W. Va. 1; s. c. 6 Am. St. Rep. 622; Mariner v. Saunders, 5 Gilm. 113; Johnson v. Bryan, 62 Tex. 623; Beene v. Randall, 23 Ala. 514; Thompson v. Phelps, 6 Dana, 390; Matthews v. Puffur, 19 N. H. 348.

instrument;¹ so that a defect in the acknowledgment in such cases invalidates not only the record but the conveyance itself. There is considerable diversity among the statutes as to the specific things requisite to a valid acknowledgment by a married woman, and this subject occupies a prominent part in the law of registration, as will be seen by reference to a subsequent chapter devoted to the matter.² Its importance, however, is a waning one, as the statutory law is undergoing a steady change in this respect. Already, by the statutes of one-half the states, the separate examination has been dispensed with, and a married woman can now convey as if she were sole.³ However much of benefit may have accrued to the wife by reason of the fine and recovery or privy examination in times when husbands, as those of the Sabine women, were such *vi et armis*, and maintained marital authority with a strong hand, it is yet believed that the malign influence of the husband as it exists in modern times, is of such insidious character as that it cannot be successfully countervailed by the formality of a separate examination by a merely ministerial officer; and however commendable it may be as an abstract theory, that the law should desire to protect the wife against the protector of her own choice, yet as a matter of fact, the modern instances in which any actual protection or benefit has been afforded to her by reason of the separate acknowledgment, are exceedingly rare; while those instances in which defects in the acknowledgments of married women have been availed of as a means for the perpe-

¹ Davis v. Agnew, 67 Tex. 207; Mason v. Brock, 12 Ill. 273; Dugger v. Collins, 69 Ala. 324; Hoskinson v. Adkins, 77 Mo. 537; Hogan v. Hogan, 89 Ill. 427; Harrisonburg B'k v. Paul, 75 Va. 594; s. c. 40 Am. Rep. 740; Gaffney v. Peeler, 21 S. Car. 55; Leonis v. Lazzarovich, 55 Cal. 52; Stilwell v. Adams, 29 Ark. 346; Clayton v. Rose, 87 N. C. 106.

² *Post*, ch. IV, §§98-121.

³ A list of the states requiring or dispensing with separate acknowledgment is given in chapter 4, §100, where the matter is treated fully. See Knight v. Paxton, 124 U. S. 552; Bradshaw v. Atkins, 110 Ill. 323, 329.

tration of fraud, are unfortunately neither rare nor uncommon.

§10. Rights of Creditors.

There is great diversity among the statutes as to the protection afforded or denied to creditors by the registry laws. In some states an unregistered deed is declared void as against "creditors;"¹ in others, as against "judgment creditors;"² in others, as against "all creditors;"³ while in a considerable number, creditors are not mentioned in the statutes at all,⁴ and unrecorded conveyances are held valid as at common law against even judgment and attaching creditors.⁵ Unless the words of the statute are so broad as to manifestly include creditors at large, only those are regarded as creditors who obtain a lien by judgment, attachment or otherwise, before an antecedent deed or mortgage

¹ Rev. Stats. of S. C. (1873), p. 422, §1. To the same effect are the statutes of North Carolina and Dist. of Columbia.

² Rev. Code of Ala. (1867), p. 364, §1557. To the same effect are the statutes of New Jersey, Minnesota, Arkansas and Colorado.

³ Rev. Stats. of Tex., §4332; Rev. Code of Miss. (1880), §1212; and similar to these are the statutes of Illinois, West Virginia, Florida, Nebraska, Delaware, Kentucky and Tennessee. Under Code of Va. (1873), ch. 114, §5, unrecorded contracts for the sale of real estate are void as to creditors with or without notice. *Dobyns v. Waring*, 82 Va. 159, citing *Marsh v. Chambers*, 30 Gratt. 299; *Guerrant v. Anderson*, 4 Rand. 208; *Floyd v. Harding*, 28 Gratt. 401. 411.

⁴ Rev. Code of Iowa (1873), §1941. This is also the case in Wyoming, (Rev. Stats. of 1887, §17), and in Ohio, New York, Nevada, New Mexico, Montana, Idaho, Missouri, Arizona, Georgia, Indiana, Michigan, Dakota, California, Oregon, Pennsylvania, Utah, Washington Territory and Wisconsin. In Maryland and Massachusetts the creditors specified are "subsequent creditors;" and in Delaware "subsequent fair creditors." Rev. Code of Del., p. 504, §17. In several of the states, as Rhode Island, Kansas, Vermont, Connecticut and Maine, the statutes are so worded as to declare an unrecorded deed valid only as between the parties and their heirs, and void as to all third parties without notice.

⁵ *Norton v. Williams*, 9 Iowa, 528; *Hoag v. Howard*, 55 Cal. 564; *Heister v. Fortner*, 2 Binn. 40; s. c. 4 Am. Dec. 417; *Hart v. Farmer's Bank*, 33 Vt. 252; *Reed v. Ownby*, 44 Mo. 204; *Cover v. Black*, 1 Pa. St. 493; *Rogers v. Gibson*, 4 Yeates, 111; *Jackson v. Dubois*, 4 Johns. 216; *Holden v. Garrett*, 23 Kan. 93; *Orth v. Jennings*, 8 Blackf. 420. This is the rule at common law. *Blankenship v. Douglass*, 26 Tex. 228; s. c. 82 Am. Dec. 608; *Finch v. Winchelsea*, 1 P. Wms. 277.

is recorded.¹ The general rule obtains that mortgagees are purchasers,² but that creditors cannot be regarded as such,³ and hence must be named in the statute. In those states where the rights of creditors are recognized, interesting questions have arisen as to the effect of notice of an unrecorded conveyance by the debtor where the notice is given to the creditor before his lien attaches to the property, and also where it is given to a subsequent purchaser of the property at or before a sale of it made in satisfaction of the creditor's lien; and as to these questions there is a direct conflict of opinion among the courts which no comparison of statutes and decisions, and no course of reasoning and deduction therefrom can reconcile or harmonize.⁴ The tendency of modern legislation, especially in reference to mortgages, is to extend the rights of creditors as against unrecorded instruments. The matter is more fully discussed in a subsequent chapter.

¹ *Ayres v. Duprey*, 27 Tex. 594; s. c. 86 Am. Dec. 657; *Martin v. Dryden*, 1 Gilm. 177; *Massey v. Westcott*, 40 Ill. 160.

² *Seevers v. Delashmut*, 11 Iowa, 174; s. c. 77 Am. Dec. 139; *Ferguson v. Edrington*, 49 Ark. 207, 214; s. c. 4 S. W. Repr. 763; *Willoughby v. Willoughby*, 1 Term, 763; *Boyd v. Beck*, 29 Ala. 713; *Dickerson v. Tillinghast*, 1 Paige, 214; s. c. 25 Am. Dec. 528; *Porter v. Green*, 4 Clarke, 571; *Jordan v. McNeil*, 25 Kan. 459.

³ *Heister v. Fortner*, 2 Binn. 40; *Twelves v. Williams*, 3 Whart. 485; *Ramsay's Appeal*, 2 Watts, 232; *White v. Denman*, 1 O. St. 112; *Harrall v. Gray*, 10 Neb. 186; s. c. 4 N. W. Repr. 1040; *Greenleaf v. Edes*, 2 Minn. 264; *Evans v. McGlasson*, 18 Iowa, 150; *Sappington v. Oeschil*, 49 Mo. 244.

⁴ Notice of an unrecorded deed comes too late after the judgment lien has attached. *Grace v. Wade*, 45 Tex. 523; *Fash v. Ravesaes*, 32 Ala. 45; *DeVandell v. Hamilton*, 27 Ala. 156; *Butler v. Maury*, 10 Humph. 420; *Uhler v. Hutchinson*, 23 Pa. St. 110; *Hulings v. Guthrie*, 4 Barr, 123; *Smith v. Jordan*, 25 Ga. 687; *Nugent v. Priebatsch*, 61 Miss. 402; *Galway v. Malchow*, 7 Neb. 285; *Wood v. Chapin*, 13 N. Y. 509; s. c. 67 Am. Dec. 62; *Massey v. Westcott*, 40 Ill. 160; *Vreeland v. Claflin*, 24 N. J. Eq. 113; *Anderson v. Nagle*, 12 W. Va. 98; *Young v. Devries*, 31 Gratt. 304; *Humphries v. Merrill*, 52 Miss. 92. But the rule is different in other states; *Hoy v. Allen*, 27 Iowa, 208; *Schmidt v. Hoyt*, 1 Edw. Ch. 652; *Morton v. Robards*, 4 Dana, 258; *Sigworth v. Meriam*, 66 Iowa, 477; s. c. 24 N. W. Repr. 4; *N. W. Co. v. Mahaffey*, 36 Kan. 152; *Burn v. Burn*, 3 Ves. 582; *Wilcoxon v. Miller*, 49 Cal. 193; *Schroeder v. Gurney*, 73 N. Y. 430.

§11. *Lex Situs*—Comity of States.

Where an instrument affecting real property situated in one state is executed in another, the general rule is that it must be executed in conformity with the law of the *situs* of the property, which controls as to what officers are authorized to take the acknowledgment or proof, and as to the manner of the taking and certifying thereto.¹ In this matter, however, as in others just mentioned, the law is undergoing a gradual change; the statutes of ten of the states now recognizing as sufficient a conveyance duly acknowledged and certified in accordance with the law of the state where it is executed.² In several other states the principle of comity is recognized in a more limited degree; thus, four of them, while requiring their own form of acknowledgment and certificate, recognize the authority to take the acknowledgment of any and all officers authorized so to do by the law of the place where it is taken.³ By the law of one state, at least, an acknowledgment taken in a foreign country is sufficient, if in accordance with the law of that country, although it would not be sufficient when so taken in a sister state.⁴ By the law of

¹ Whart. on Conflict of Laws, §275; Kerr v. Moon, 9 Wheat. 565; U. S. v. Fox, 94 U. S. 315; Goddard v. Sawyer, 9 Allen, 78; Nicholson v. Leavite, 4 Sand. 252; Donaldson v. Phelps, 18 Pa. St. 170; Lewis v. Barry, 72 Pa. St. 18; Whart. on Ev., §1052. See Tillotson v. Pritchard, 60 Vt. 94; Eggleston v. Bradford, 10 Ohio, 312, 315.

² Rev. Stats. Wyoming (1887), §11. The other states are Florida, Illinois, Moore v. Nelson, 3 McLean, 383; Louisiana, Michigan, Root v. Brotherson, 4 McLean, 230; Nebraska, Ohio, Bailey v. Bailey, 8 Ohio, 239; Oregon and Wisconsin; Foster v. Dennison, 9 Ohio, 121; Edward v. Flannagan, 104 U. S. 562; Allen v. Parish, 3 Ohio, 107.

³ Laws of New York (1867), ch. 557. To same effect are the statutes of Pennsylvania, Vermont and Washington Territory. In all these cases a certificate of magistracy is required to accompany that of the acknowledgment.

⁴ Gen. Stats. of Minn. (1878), ch. 40, §10. In South Carolina the proof for record required in the state will not apply where the deed is proved out of the state. *Wolfolk v. Graniteville Co.*, 22 S. C. 332. This is also the case in North Carolina, *Starke v. Etheridge*, 71 N. C. 210. By the statutes of Wyoming, a conveyance may be acknowledged in another state according to the law of such state, but if in a foreign country, it must be according to the laws of Wyoming; Rev. Stats. (1887), §§11-13.

North Carolina, until within a recent period, it seems that an acknowledgment taken in another state would not be recognized, unless the authority of the officer emanated directly from North Carolina, either by appointment from the governor, as commissioner of deeds for the state, or by virtue of a commission issued directly to some person, empowering him to take the acknowledgment of the particular deed desired to be probated in North Carolina.¹ It is to be observed that when a statute designates, for purposes of acknowledgment, a certain class of officers within and of another state, in so doing it recognizes the laws of such other state, since in determining whether a given officer is such as he purports to be, duly qualified and acting within his local jurisdiction, resort must be had to the laws of his own state, upon which his authority is dependent, and by which it must be determined. The acknowledgment of a deed is an act largely personal in its character, and if the laws of another state are to be recognized in the matter at all, they might be fully recognized as well. Otherwise, to be entirely consistent, the former North Carolina rule should prevail. When it is considered that the several states are but parts of one government, separated neither by walls nor by diversity of languages, but only by intangible lines across which the business of the country flows without let or hindrance, and further that endless confusion and mistakes grow out of the exaction by one state that officers in another state shall use forms and methods with which they are not familiar, it will be seen that the better reason is with the statutes that hold as sufficient an acknowledg-

¹ Acts 1876-7, ch. 161; Code of 1883, sec. 1258. Where the rule of comity prevails, the acknowledgment of a married woman in another state, taken as if sole, will be recognized, though the state so recognizing it may at home require a separate examination. *Foster v. Dennison*, 9 Ohio, 121, 125. So, as to the competency and number of witnesses, if the deed is valid where executed, it will be recognized as sufficient. *Tillotson v. Pritchard*, 60 Vt. 94; s. c. 14 Atl. Repr. 302; *Eggleston v. Bradford*, 10 Ohio, 312, 315.

ment made and certified in accordance with the law of the place where taken.

§12. Actual Notice as Supplying Registration.

In many of the states it is declared by statute that the subsequent purchaser who is protected against an unrecorded conveyance must be a purchaser in good faith, or "without notice;" and following the doctrine of equity as laid down in the early English case of *LeNeve v. LeNeve*, the courts usually hold this to be the law, even where the statute is silent on the matter of notice.¹ By some of the statutes the subsequent purchaser must be without knowledge, or without "actual notice."² Partly owing to this

¹ *Fargason v. Edrington*, 49 Ark. 207; *Smith v. Proffat*, 82 Va. 832, 851; s. c. 1 S. E. Repr. 67; *Effinger v. Hall*, 81 Va. 94; *Strohm v. Good*, 113 Ind. 93; s. c. 14 N. E. Repr. 901; *Petry v. Ambroscher*, 100 Ind. 510; *Manaudus v. Mann*, 14 Or. 450; s. c. 13 Pac. Repr. 449; *Blalock v. Newhill*, 78 Ga. 245; *Tuttle v. Jackson*, 6 Wend. 213; *Britton's Appeal*, 45 Pa. St. 172; *Butler v. Viele*, 44 Barb. 166; *Underwood v. Ogden*, 6 B. Mon. 606; *Ayres v. Duprey*, 27 Tex. 594; s. c. 86 Am. Dec. 657; *Morris v. White*, 36 N. J. Eq. 324; *Maxwell v. Brooks*, 54 Ind. 98; *Bell v. Thomas*, 2 Iowa, 384; *Nelson v. Dunn*, 15 Ala. 501; *Musgrove v. Bonser*, 5 Or. 313; *Morrill v. Morrill*, 53 Vt. 74; *Harrington v. Allen*, 48 Miss. 493; *Beal v. Gordon*, 55 Me. 482; *White v. Foster*, 102 Mass. 375; *Owens v. Miller*, 29 Md. 144; *Gilbert v. Jess*, 31 Wis. 110; *Tucker v. Tilton*, 55 N. H. 223; and cases cited *post*, §217.

The policy of the rule was questioned in some of the early English cases, and a disposition manifested to restrict it to cases where the notice was so direct and full as to render a subsequent purchase an act of positive fraud; 2 *White & Tudor's Lead. Eq. Cases* (4 Am. ed.), 217-219; *Wyatt v. Barwell*, 19 Ves. 435; *Jelland v. Stainbridge*, 3 Ves. Jr. 478; *Hine v. Dodd*, 2 Atk. 275; *Davis v. Strathmore*, 16 Ves. 419; *Ford v. White*, 16 Beav. 123; and this is substantially the law as it now exists in North Carolina, where record is essential to the conveyance of the legal title, and actual notice is given but a very limited effect. *Fleming v. Burgin*, 2 Ired. Eq. 584; *Robinson v. Willoughby*, 70 N. C. 358; *Bank v. Mfg. Co.*, 96 N. C. 298; s. c. 3 S. E. Repr. 363.

The doctrine of actual notice is rejected in Louisiana entirely. *Harang v. Plattsmier*, 21 La. Ann. 416; *Tulane v. Levison*, 2 *Id.* 787; *Payne v. Pavey*, 29 *Id.* 116; *Berwin v. Weiss*, 28 *Id.* 363.

In Arkansas and Ohio actual notice is unavailing to supply the want of record as to mortgages. *Home Build. Ass'n v. Clark*, 43 O. St. 427; *Dodd v. Parker*, 40 Ark. 526; *Fry v. Martin*, 33 Ark. 203; *Bercaw v. Cockerill*, 20 Ohio St. 163; *Mayhew v. Combs*, 14 Ohio, 428; excepting chattel mortgages; *Paine v. Mason*, 7 O. St. 199.

² The states whose statutes declare that the subsequent purchaser protected against an unrecorded instrument must be without "actual"

variance of terms, and, in a large measure, to a different construction by the courts as to the character of notice requisite to charge a second purchaser, there is quite a conflict of law and decision on this matter.¹ It might, with reason, be held that "actual notice," as used in this connection, means any and every kind of notice, direct or implied, arising from a matter of fact, as contradistinguished from the constructive notice imparted as a legal presumption by the record. It is, however, held in several states to mean little less than actual personal knowledge, and to require a character of notice so direct and complete in its nature as that no part of it shall be implied or constructively imputed to the party charged, by reason of facts brought to his attention sufficient to have put a reasonable man upon inquiry.² Possession, for instance, is in some states held insufficient, of itself alone, to give actual notice of title in the occupant, although it is a fact well calculated in its nature to put upon inquiry.³ In a majority of the states a much more liberal rule prevails, and any fact which ought properly to charge the conscience, and to put a prudent man upon further investigation that, if prosecuted, would lead to knowledge of an unrecorded instrument, will charge him with notice of it.⁴

notice, are Arkansas, Indiana, Kansas, Maine, Tennessee, Massachusetts, Utah, Missouri, Wisconsin and New Mexico Territory. In Ohio, the subsequent purchaser must be one having "no knowledge" of the former conveyance. In some states "actual" notice is required as to mortgages, though not as to deeds. Civ. Code of Cal. §§1107, 1214, 2950; Rev. Code of Dak. (1877), §1741a.

¹ See, *post*, ch. ix, where this subject is treated in detail.

² See cases cited above, and *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Williamson v. Brown*, 15 N. Y. 354, 357; *Wilson v. McCullough*, 23 Pa. St. 440; s. c. 62 Am. Dec. 347; *Flagg v. Mann*, 2 Sumner, 486; *Dey v. Dunham*, 2 Johns. 168; *The Gen. Life Ins. Co. v. The U. S. Life Ins. Co.*, 10 Md. 517; s. c. 49 Am. Dec. 174.

³ *Harral v. Lavery*, 50 Conn. 46; *Beal v. Gordon*, 55 Me. 482; *Pomerooy v. Stevens*, 11 Metc. 244; *Mara v. Pierce*, 9 Gray (75 Mass.), 306; *Harris v. Arnold*, 1 R. I. 125; *Lamb v. Pierce*, 113 Mass. 72.

⁴ The general rule is that possession is notice. *Craig v. Cartwright*, 65 Tex. 414; *Vaughan v. Tracy*, 22 Mo. 405; s. c. 69 Am. Dec. 471; *Burt v. Cassety*, 12 Ala. 734; *Davis v. Hopkins*, 15 Ill. 519; *Rogers v.*

§13. Subsequent Deed Required to be First of Record.

The statutes of nearly one-third of the states and territories provide that an unregistered conveyance shall be void as against a subsequent purchaser in good faith "whose conveyance shall be first recorded."¹ Where the statute does not by such express terms make the rights of the subsequent purchaser depend on priority of record, such priority, or the want of it, is immaterial; and the courts have almost uniformly held that a subsequent conveyance for valuable consideration, taken without notice of a prior unrecorded one, prevails over such prior instrument, whether the later one be first recorded or not.² Where, through the neglect of the first grantor to record his deed, a subsequent party has been led to part with a valuable consideration, a race for registry between the two does not afford a proper criterion by which their rights should be determined. In *Steele v. Spencer*, 1 Pet. 552, the Supreme Court of the United States had under consideration a register act of Ohio, which declared that any deed not recorded as required by that act "shall be fraudulent as against any subsequent *bona fide* purchaser for valuable consideration, without notice of such deed"—language not substantially

Jones, 8 N. H. 264; *Havens v. Bliss*, 26 N. J. Eq. 363, and cases cited, *post*, §219.

¹ California, Dakota, Idaho, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, Oregon, Pennsylvania, Tennessee, Utah, Wisconsin and Wyoming. In New York, previous to the giving of preference by statute to priority of record, it was held that a *bona fide* purchaser was protected against a prior mortgage, although the mortgage was first recorded. *Hawley v. Bennett*, 5 Paige, 104; *Jackson v. Center*, 19 Johns. 281.

² *Coster's Executors v. Bank of Ga.*, 24 Ala. 37; *Steele v. Spencer*, 1 Pet. 552; *Northrup v. Bremer*, 8 Ohio, 392; *Ranney v. Hogan*, 1 Tex. Un. Cas. 253; *Wheaton v. Dyer*, 15 Conn. 307; *DeCoursey v. Collins*, 21 N. J. Eq. 357; *Sanborn v. Adair*, 29 N. J. Eq. 338; *Byrd v. Wilcox*, 8 Baxt. 65, 68; *Coleman v. Barklew*, 3 Dutch. 357; *Chaffee v. Halpin*, 62 Miss. 1; *Gardner v. Earley*, 72 Iowa, 518; s. c. 34 N. W. Repr. 311; *McGuire v. Barker*, 61 Ga. 339. In *Fallass v. Pierce*, 30 Wis. 443, the matter is ably discussed by a divided court, and while the decision in that case is controlled by the express terms of the Wisconsin statute giving priority to the order of registry, it is admitted that but for the

different on this point from the general tenor of those statutes that do not require the subsequent deed to be first recorded. The court in construing this statute say: "The prior deed not being recorded, the statute avoids it in terms as against all subsequent purchasers for valuable consideration without notice, whether their titles be recorded or not." It will be observed that this decision is based upon a construction of the terms of the statute, which, aside from any consideration of the equities of the parties, are held to determine the question in favor of the junior purchaser. The Supreme Court of Alabama, in construing a statute similar to that of Ohio, thus state the same conclusion more fully: "This act of 1823¹ makes no requirement of the subsequent mortgagee that he must record his mortgage or stand in the same predicament as the first mortgagee with his unrecorded mortgage. The act simply declares the unregistered deed to be void against the subsequent mortgage, *bona fide* and upon valuable consideration, where such mortgage is contracted without notice of the prior incumbrance. The second mortgagee, in not recording his mortgage, runs the risk simply of being overridden by some subsequent mortgagee or incumbrancer, and in that case the statute would declare the nullity of his mortgage, and prefer the subsequent one, as it prefers his to the previous one. A different rule would prevail if the statute gave the preference to the mortgage first recorded; but that is not so, nor does the act require the second mortgage to be registered at all, but it pronounces the second mortgage, in its execution and delivery, if executed and received in ignorance of the first mortgage, its superior."²

statute the rule could be different; and to the same effect see *Galway v. Malchow*, 7 Neb. 285.

¹ Clay's Dig. of Ala. 154, §18.

² *Coster's Executors v. Bank of Ga.*, *supra*; and to same effect, *Sanborn v. Adair*, 29 N. J. Eq. 338; *post*, §166.

§14. Continued—Equity of the Matter.

The Supreme Court of Texas say that, in a matter of this kind, if the statute does not expressly determine the question, the court will decide it upon the very equity of the case presented.¹ This equity is clearly held to be in favor of the subsequent purchaser, who by reason of the neglect of the prior purchaser, and upon the faith of a record showing no adverse conveyance or incumbrance, has parted with a valuable consideration. The first purchaser is in default; the equities of the parties are not equal; and the case is not one where the maxim *prior in tempore, potior in jure* applies. It is the parting with a consideration, the payment of value without notice, that gives and fixes the equity of the subsequent purchaser;² and this cannot be afterwards taken away by the act of the party in default, in subsequently recording his prior deed.³ Such record comes too late to serve as notice to the junior purchaser; even actual notice, it has been held, could not then deprive him of his equities;⁴ nor does the record of the second deed serve any purpose as notice to the first purchaser.⁵ There are cases, however, in which the equities of the transaction are such that precedence may properly be given to him who is first on record.⁶ These instances occur most frequently in connection with mortgages given to secure

¹ Johnson v. Newman, 43 Tex. 628; Swigert v. Bank of Ky., 17 B. Mon. 268.

² See as supporting the foregoing equitable principles, though not in all cases directly on this point of record priority, Boggs v. Varner, 6 Watts & S. 469, 474; Garland v. Harrison, 17 Mo. 282; Ozias v. Bromback, 117 Pa. St. 87, 93; s. c. 11 Atl. Repr. 301; Neslin v. Wells, 104 U. S. 428; Williams v. Beard, 1 S. Car. 309; Ely v. Wilcox, 20 Wis. 523; s. c. 91 Am. Dec. 436; Bellas v. McCarty, 10 Watts, 13; Fisher v. Knox, 11 Pa. St. 622; Wheaton v. Dyer, 15 Conn. 307; Jerrard v. Saunders, 2 Ves. Jr., 454.

³ Ranney v. Hogan, 1 Tex. Un. Cas. 253.

⁴ Stanhope v. Varney, 2 Eden, 81; Youst v. Martin, 3 Serg. & R. 423, 430; Elsey v. Lutzens, 8 Hare, 159.

⁵ Martin v. Williams, 27 Ga. 406; Jackson v. Post, 9 Cow. 120; Van Rensaeller v. Clark, 17 Wend. 25.

⁶ See Choteau v. Jones, 11 Ill. 300.

antecedent indebtedness.¹ Where each of two mortgages, given to different parties, is to secure indebtedness incurred in each case before the execution of either one of them, neither one, while unrecorded, can claim a higher equity than the other; and in such case, even actual notice given to the second mortgagee before his mortgage is taken, cannot deprive him of the preference acquired under the statute by a first record.²

§15. Continued—The Contrary Doctrine as to Priority of Record.

There are but few, if any, decisions to be found, which, in the absence of a statute requiring it, hold that the subsequent deed must be first of record.³ A question may suggest itself here as to why so considerable a number of the statutes should contain a provision so clearly at variance with the equity and justice of the matter to which it relates. The early English register acts were framed with the sole view of securing an early record of conveyances after they were executed. They did not declare that the record should impart notice, nor was it then contemplated that actual notice should destroy or affect the precedence given to priority in record, as afterwards held by the courts of equity. The object of the statutes at that time was simply to secure a prompt record of conveyances, and in order to attain this object, it declared that they should be adjudged void as against any subsequent purchaser or mortgagee for valuable consideration, unless registered before the record of the conveyance to the subsequent purchaser or mortgagee.⁴ As the record was not to impart construc-

¹ Davidson v. Cowan, 1 Dev. Eq. 470; Muse v. Letterman, 13 Serg. & R. 167; National Bank v. Whitney, 103 U. S. 99; Routh v. Spencer, 38 Ind. 393; *post*, §§169-172.

² Moore v. Thomas, 1 Or. 201; Bank v. Manufacturing Co., 96 N. C. 298; s. c. 3 S. E. Repr. 363.

³ The following cases are only seemingly to the contrary: Cabeen v. Breckinridge, 48 Ill. 91; Strebbs v. Duncan, 108 U. S. 32.

⁴ Act of 7th Anne, ch. 20, quoted in §1, *ante*; *post*, §166.

tive notice, it follows that an advantage of priority was the sole inducement that could then be held out to secure compliance with the law. In that stage of the law there belonged to the bare fact of early record an importance to which, by reason of the changes that have since occurred, it is not now justly entitled. A too literal copying of the early statutes has, doubtless, occasioned that feature of the modern legislation which still renders the rights of a *bona fide* subsequent purchaser dependent upon priority of record; but since the equitable doctrine that actual notice shall supply the want of registration, and that the equities of the transaction shall control the bare fact of priority of record, has been universally assented to and adopted as part of the law of registration, it should have a consistent application; and bare priority of record should not dominate the equities of the matter in one instance, and yet be subordinated to them in another; and where, after a subsequent purchaser has parted with a valuable consideration, actual notice to him of a prior deed comes too late, the technical notice constructively imparted by registration should not be given a greater effect.¹

§16. Filing and Mistake in Recording—Effect as to Notice.

It is the law of perhaps every state, that a deed duly recorded operates as notice from the time it was filed for record.² The record, when correctly made, is properly held to relate back to the time of filing, for the reason that

¹ Mr. Sugden says, it is the policy of the law to encourage prompt registration by requiring that the deed shall be put upon the registry under penalty that if not found thereon, the subsequent purchaser without notice shall gain the priority by the earlier record of his deed. 2 Sug. on Vendors, 214. Where the statute is so framed as to make registry essential to title passing, and actual notice is rejected entirely, priority of record must of course control. See, *post*, §§217, 218; *Bank v. Clapp*, 76 N. C. 482; *Thompson v. Bullock*, 1 Bay, 367.

² *Leslie v. Hinson*, 83 Ala. 266; *Kessler v. State*, 24 Ind. 213; *Horseley v. Garth*, 2 Gratt. 471; s. c. 44 Am. Dec. 293; *Brook's Appeal*, 64 Pa. St. 127.

between the date of filing and that of the transcribing, the instrument itself remains in the recorder's office subject to public inspection. After the record is made, however, the original instrument is usually taken out, and to the record alone the public must look for information. Sometimes, through a mistake in copying, the record speaks a language different from the original, as, in wrongly describing the property, or stating a different amount of mortgage indebtedness; and the question then arises whether such a record will charge a subsequent party with notice¹ of the true contents of the original. There is considerable diversity in the statutory language bearing on this point, and aside from any difference of terms used in the various registry acts, there is a direct conflict of opinion as to the correct rule of construction in such cases. Some of the statutes expressly provide that a deed "shall be considered as recorded from the time it is delivered to the clerk for record;" in others, the language is that the deed "shall take effect and be in force as to subsequent purchasers from and after the filing of the same for record." Where the statute uses the language quoted above, or direct terms of similar import, the courts hold, as a rule, though not with entire uniformity, that the grantee in a deed which has been filed, but erroneously transcribed in the record book, or even not recorded at all, is not affected by the error or failure to record, since the statute gives to the filing alone the full effect of notice.¹ In *Mims v. Mims*,

¹ *Fouche v. Swan*, 80 Ala. 153; *Case v. Hargadine*, 43 Ark. 144; *Glading v. Frick*, 88 Pa. St. 460; *Bradford v. Tupper*, 30 Hun. 174; *Woodward v. Boro*, 16 Lea (84 Tenn.), 678; *Nichols v. McReynolds*, 1 R. I. 30; s. c. 36 Am. Dec. 238; *Steam Co. v. Sears*, 23 Fed. Rep. 313; *Hine v. Roberts*, 8 Conn. 347; *Swenson v. Bank*, 9 Lea, 723; *Ferris v. Smith*, 24 Vt. 27; *Marbury v. Madison*, 1 Cranch, 137; *Mangold v. Barlow*, 61 Miss. 593; s. c. 48 Am. Rep. 84; *Oats v. Walls*, 28 Ark. 244; *Perkins v. Strong*, 22 Neb. 725; *Gillespie v. Rogers*, 146 Mass. 610, 612; *Tracy v. Jenks*, 15 Pick. 465; *Kiser v. Heuston*, 38 Ill. 252; *Merrick v. Wallace*, 19 Ill. 486; *Wood's Appeal*, 82 Pa. St. 110; s. c. 13 Am. Law Reg. 255; *Lee v. Birmingham*, 30 Kan. 312; s. c. 1 Pac. Repr. 73; *Flowers v. Wilkes*, 1 Swan, 408; *Converse v. Porter*, 45 N. H.

35 Ala. 23, the court say that the statute making a conveyance "operative as a record"¹ from the time of its delivery for record, relieves them from examining the cases cited by counsel which hold that the record imparts notice only of what it contains.

In *Throckmorton v. Price*, 28 Tex. 605 (s. c. 91 Am. Dec. 334), where a trust deed had been duly filed and left with the recorder, but through oversight had not been transcribed, it was held that a subsequent purchaser was chargeable with constructive notice of it, although he had vainly inquired of the recorder for instruments affecting the land; the decision being put on the ground that the statute, in declaring that a deed "shall be considered as recorded from the time it was deposited for record"² and filed by the clerk,³ gave the full effect of notice to the filing. Apparently in direct conflict with this, however, is the decision in *Taylor v. Harrison*, 47 Tex. 454 (s. c. 26 Am. Rep. 304), a case wherein the recorder, through oversight in transcribing a deed duly filed, neglected to copy the certificate of acknowledgment; and in which it was held that the deed "was not properly recorded, and creditors and subsequent purchasers are not chargeable with notice of it by reason of such defective record." How a failure to copy the certificate could destroy the notice imparted by the filing, when an entire failure to record the deed would not have that effect, is not explained. And in a later case the court answer an objection made because of an error in copying the deed on the record, not by saying it was unnecessary that there should be any record at all, but by holding the error to be not misleading in its character and

400; *Payne v. Pavey*, 29 La. Ann. 116; *Freiberg v. Magale*, 70 Tex. 116, 118; s. c. 7 S. W. Repr. 684.

¹ Code of Ala. §1539; Code of 1886, §1793.

² Rev. Stats., of Tex., art. 4299; Paschal's Dig., art. 5014; O. & W. Dig., art. 1709.

³ Rev. Stats., art. 4334; Paschal's Dig., art. 4994.

effect.¹ An explanation of this apparent conflict might be that in the first case the deed was still on the unrecorded file in the recorder's office, and thus itself served as a record at the time the subsequent deed was made; while in the other cases the deeds had doubtless been removed, and the grantees having chosen to take them out, or to have the notice imparted by them merged into that of the record, must be held to have elected to stand by the record as made. This is the only theory in such cases consistent with the policy of the registry laws, and the well established rule that a purchaser may rely upon the title as it appears of record.²

¹ *Woodson v. Allen*, 54 Tex. 551. The case of *Crews v. Taylor*, 56 Tex. 461, in which a mortgage, on file but not copied on the record, was held to impart notice, is similar in its facts in this particular, to that of *Throckmorton v. Price*, 28 Tex. 605; s. c. 91 Am. Dec. 334, and is decided in accordance with it.

² *Jones on Mort.*, §549; *Hill v. McNichol*, 76 Me. 314; *Hart v. Farmer's Bank*, 33 Vt. 252; *Newhall v. Burt*, 7 Pick. 157; *Mills v. Comstock*, 5 Johns. Ch. 314; *Columbia Bank v. Jacobs*, 10 Mich. 349. If the mortgage and annexed schedule are both left with the recorder, they are sufficient notice to the public while they remain unrecorded; but after the mortgage alone has been spread upon the record, that is the only record which the law recognizes. *Sawyer v. Pennell*, 19 Me. 167.

It is the duty of the person filing an instrument to see that the statutes as to its record are complied with, and the loss, if any, falls on him and his assignees. *Barney v. McCarty*, 15 Iowa. 515; s. c. 83 Am. Dec. 427; citing *Bradford v. Miller*, 12 Iowa, 11. He has the opportunity of preventing an error which the subsequent party has no opportunity to detect. *Succession of Falconer*, 4 Rob. 7.

A deed erroneously transcribed is notice only of what appears on the record, although it be left on the file. After its record, the deed itself is no longer notice. *Potter v. Dooley*, 55 Vt. 512.

The cases cited in note, *ante*, p. 41, holding that the instrument imparts notice from the time of filing, do not recognize the limitation suggested, viz: that the rule should apply only until the deed is actually recorded, and that afterwards the record should impart notice only of what appears on it; but where the filing is held to charge notice, it would seem that the rule is that it is immaterial how or where the instrument is recorded; it may be recorded in a wrong book. *Swenson v. Bank*, 9 Lea, 723; *Head v. Goodwin*, 37 Me. 181; *Lewis v. Klote*, 39 La. Ann. 259; s. c. 1 South. Repr. 539.

Priority in filing is not affected by a different priority in recording. *Johnson v. Burden*, 40 Vt. 567; s. c. 94 Am. Dec. 436.

§17. Continued—Imperfect Record is not Notice.

The Supreme Court of Iowa, however, has put a different construction on language as express in its import as that just under consideration. There the provision was that a deed “shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof;” and it was held that the statute was intended simply to fix the *time* from which notice was to commence, and not to make such filing on depositing notice of the contents after the same was recorded; and that after that date, the record itself was the constructive notice of its contents.¹ Under a statute of Missouri, providing that every instrument “certified and recorded in the manner prescribed, shall, from the time of filing the same with the recorder, impart notice,” etc., it was held by the Supreme Court of that state that, according to the literal interpretation of the statute, no notice was imparted until the instrument was actually placed on record, and then it related back to the time of its filing; and that the statute, in saying that when a deed is certified and recorded, it shall impart notice of the contents from the time of filing, was to be understood in the sense that the deed was rightly recorded, and the contents correctly spread upon the record.² The greater weight of reason, if not of authority, seems to be in favor of this view of the law, that the record cannot impart notice of what it does not contain; and that because of the relation back to the filing, the constructive notice imparted by the record cannot properly be held to extend beyond, or differ from, that which would be afforded by an actual reading of the record.³

¹ Miller v. Bradford, 12 Iowa, 14; and see Barney v. McCarty, 15 Iowa, 515; Thorp v. Merrill, 21 Minn. 336.

² Terrell v. Andrew County, 44 Mo. 309.

³ Schell v. Stein, 76 Pa. St. 398; s. c. 18 Am. Rep. 416; Gilchrist v. Gough, 63 Ind. 576; s. c. 30 Am. Rep. 250; Disque v. Wright, 49 Iowa, 538; Wait v. Smith, 92 Ill. 385; Burke v. Anderson, 40 Ga. 535; Frost v. Beekman, 18 Johns. 544; Succession of Falconer, 4 Rob. 7; Ford v. James, 4 Keyes, 300; Lally v. Holland, 1 Swan, 396; Bryden v. Camp-

§18. Continued—Reason of the Rule.

A comparison of the statutes demonstrates that the difference in their terms is not such as to justify the wider difference in the decisions of the courts on this point. The conflict of opinion is chiefly due to an inability to agree upon a correct rule of construction.¹ A solution of the question has been sought by reference to the liability of the recorder for the mistake or neglect.¹ Under his official bond he is liable to the party injured, and it is said that the subsequent purchaser, or party misled by the record, is the party injured. This conclusion is deduced from the consideration that the registry laws are designed for the protection of subsequent parties, since, at common law, the first grantee would be protected and retain his title whether his deed was recorded or not. But it may be urged with equal if not greater force, that since the registry laws are designed for the benefit of the subsequent purchaser, they ought for that very reason to operate primarily and directly in his favor, by giving him the superior right to the property involved, and not secondarily, by conferring a right of action for damages against the recorder and his bondsmen.² It is conceded that the equities of the parties

bell, 40 Md. 331; *Crosby v. Vleet*, 3 N. J. Law, 86; *Jennings v. Wood*, 20 Ohio, 261; *Hughes v. Debnamy*, 8 Jones, 127; *Wyatt v. Barwell*, 19 Ves. 439; *Peck v. Mallams*, 10 N. Y. 509; *Miller v. Ware*, 31 Iowa, 524; *Taylor v. Hotchkiss*, 2 La. Ann. 917; *Barnard v. Campau*, 29 Mich. 162; *Shepherd v. Burkhalter*, 13 Ga. 443; s. c. 58 Am. Dec. 523; *Jones v. McNarrin*, 68 Me. 334; s. c. 28 Am. Rep. 66; *Potter v. Dooley*, 55 Vt. 512; *Smith v. Lowry*, 113 Ind. 37; s. c. 15 N. E. Repr. 17; 14 West Repr. 621; *Stead v. Grosfield* (Mich.) 34 N. W. Repr. 871; 4 West. Repr. 494; *Hill v. McNicol*, 76 Me. 314; *Ins. Co. v. Scales*, 27 Wis. 640; *Parrot v. Shaubhut*, 5 Minn. 223; *Scott v. Hickman*, Hemp. 275; *Baldwin v. Marshall*, 2 Humph. 116; *Jones on Mort.*, §§551, 582; 2 Pom. Eq. Jur., §654; *Bank v. Carpenter*, 7 Ohio, 68; *Stedman v. Perkins*, 42 Me. 130.

¹ Wade on Notice, §§150-162; 1 Devlin on Deeds, §697.

² Upon general principles of law, the recorder is liable to any third party for damages resulting from his negligence. *Crews v. Taylor*, 56 Tex. 465; *Giffin v. Barr*, 60 Vt. 590; *Fox v. Thibault*, 33 La. Anu. 32. Being liable to any person injured, the question of his liability can afford no proper test by which to determine who is the party injured. See *Fogarty v. Finlay*, 10 Cal. 239; s. c. 70 Am. Dec. 214.

are equal. The first grantee has deposited his deed for record as required by law, and the second has examined the record as required by law. In deciding which of two innocent parties shall primarily bear the loss resulting from the act or omission of the clerk, it is proper to consider what line of construction will best promote the public interests and subserve the policy of the law. That the law, in a case of equal equities, should elect upon rather technical grounds to maintain the sufficiency of a record which, through error in transcribing, is false in fact, is a matter not calculated to commend it to the favorable consideration of enlightened minds, nor to inspire public confidence in the registry acts as affording a just protection to purchasers in good faith. "The recording acts," said Chief Justice Waite, "are intended for the security of titles and the prevention of frauds. They are to be construed liberally to that end. As the record, when made, is constructive notice to all having the legal right to rely upon it for protection, public policy requires that it shall import as near absolute verity as is consistent with a due regard to the rights of the parties interested."¹

§19. Extension of the Registry Acts—What Interests and Instruments Now Embraced.

In some of the early English and American cases it was held that the object of the registry acts was to protect *bona fide* purchasers against a previous conveyance of the legal estate, or some part thereof, and that the conveyance of an equity was not within the acts, and would not operate as notice if registered.² It is now, however, almost univer-

¹ National Bank of Fredericksburg v. Conway, 1 Hughes (Cir. Ct. for Va.), 37; 9 Myers' Federal Decisions, §82. See, also, Hart v. Farmer's Bank, 33 Vt. 253, and other cases cited in note 2, p. 43. The purpose of the law is to secure a permanent record of instruments, to which record the public must look. Filing is but a preliminary step, and should not be given the controlling effect, nor be held to dispense with the record altogether.

² Doswell v. Buchanan, 3 Leigh, 362; s. c. 23 Am. Dec. 280; Grimstone v. Carter, 3 Paige, 421; Kelly v. Mills, 41 Miss. 267; Swigert v.

sally held that the design of the law is that all rights affecting or in any wise concerning land should appear on the public records, and hence that conveyances of equitable interests are within the registration acts.¹ An equitable interest in the nature of a resulting trust is now the only generally recognized exception to the rule that every interest affecting land shall be disclosed by the records or suffer the consequences imposed by the registration laws;² nor is such trust entirely excepted. The scope of the registry acts has also been extended by statute to include title to or interests in various kinds of personal property. On this branch of the law the statutes are not at all uniform, and are undergoing frequent alterations, especially in reference to chattel mortgages, which will be hereafter treated more fully. Recent legislation has also in many instances provided for the registry of homestead interests, notices of the separate property of the wife, and various matters of this kind that do not fall with the ordinary definition of title or incumbrance. The operation of the registry acts having been found beneficial, it is the evident design and drift of legislation to broaden them to the fullest extent consistent with reason and equity.

The Bank of Ky., 17 B. Mon. 268; *Herrington v. Williams*, 31 Tex. 448; *Morton v. Robards*, 4 Dana, 258; *post*, §203.

¹ *Harrison v. Cochelin*, 23 Mo. 117; *Bush v. Golden*, 17 Conn. 594; *Wild v. Brooks*, 10 Minn. 50; *Batts v. Scott*, 37 Tex. 59; *Parkhurst v. Alexander*, 1 Johns. Ch. 394; *Blankenship v. Douglass*, 26 Tex. 225; s. c. 82 Am. Dec. 608; *O'Neill v. Seixas* (Ala. Code, §1810), 4 South. Repr. 745; *Putnam v. White*, 76 Me. 551; *Smith v. Neilson*, 13 Lea, 461; *post*, §§36, 37; *Alderson v. Ames*, 6 Md. 52; *Bellas v. McCarty*, 10 Watts, 13; *Worley v. State*, 7 Lea, 382.

² *Carson v. Phelps*, 40 Md. 73; *Yoe v. Montgomery*, 68 Tex. 338; *Blankenship v. Douglass*, 26 Tex. 229; s. c. 82 Am. Dec. 608; *Parker v. Coop*, 60 Tex. 117; *Miss. Valley Co. v. Ry. Co.*, 58 Miss. 854; *Perry on Trusts*, §218; *Stor. Eq. Jur.* §1264.

For instances in which the purchaser of an equitable interest who knows the legal title is outstanding, will not be protected, see *Goldsborough v. Turner*, 67 N. C. 403; *Briscoe v. Ashby*, 24 Gratt. 45; *White v. Nashville Ry. Co.*, 7 Heisk. 518; *Craig v. Leiper*, 2 Yerg. 193; s. c. 24 Am. Dec. 479; and other cases cited in note to *Walton v. Hargrove*, 42 Miss. 18; s. c. 97 Am. Dec. 429. For case where the purchaser was protected against a resulting trust, see *Richardson v. Henry* (Iowa), 40 N. W. Repr. 115.

§20. Vendor's Lien.

Where the doctrine of an implied vendor's lien for the unpaid purchase money of real estate obtains, the relation of this lien to the registry laws has never been satisfactorily defined. At the time such doctrine was adopted by the English courts of equity, the registry system was comparatively unknown.¹ Aside from any objections springing from the registry laws, this suppositious lien has never been rested upon any very satisfactory grounds.² As between the parties, there is a natural equity that property sold should stand charged with the unpaid purchase price; but so far as concerns third persons subsequently dealing with the property and the vendee on the faith of an unincumbered record, or of ownership in the vendee, the mere fact that the debt of the vendor is for purchase money gives it no such special equity as renders it superior to the claims of all other creditors of the vendee, as against the property.³ It has been well said that, in a mere contest of equities, the vendor's lien is entitled to no special protection.⁴ Indeed,

¹ The doctrine seems to have been settled at the time of the case of *Blackburn v. Gregson*, 1 Bro. Ch. 420; but prior to that it had been doubted by Lord Bathurst, in *Fawell v. Heelis*, Amb. 724, that there was such an equitable lien. *Mackreth v. Symmons*, 15 Ves. 329.

² The courts imply a lien on the assumption that the parties in all cases intend to reserve it, where they do not by express acts evince a contrary intention. This implication, says Chief Justice Gibson, is in almost every case inconsistent with the truth of the facts, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass. *Kauffelt v. Bower*, 7 Serg. & R. 64, 76.

³ Under the Roman law, from which the doctrine was borrowed, the lien extended to personal as well as real property, and there is as much natural equity in the case of personalty as in that of realty. But in this country the doctrine has never been applied to personalty. *Warren v. Fenn*, 25 Barb. 334; *Blackburn v. Gregson*, 1 Cox. Ch. 90; except in Louisiana, whose jurisprudence is derived from the Roman law. *Shelley v. Winder*, 38 La. Ann. 182; *McIlvaine v. Legare*. *Id.* 359.

⁴ *Staples, J.*, in *Gordon v. Rixley*, 76 Va. 694, citing *Moore v. Holcombe*, 3 Leigh, 397. In Massachusetts the court rejects the implied lien, because it would introduce a new exception to the statute of frauds tending to promote uncertainty in litigation, and because unfounded in principle, unsuitable to the conditions and usages there, and unnecessary to secure the just rights of parties. *Ahrend v. Odiorne*, 118 Mass. 261.

Chief Justice Marshall, in declaring it "inconsistent with the principles of equity, and with the general spirit of our laws that such a lien should be set up in a court of chancery to the exclusion of *bona fide* creditors," adjudges the equity of the vendor to be inferior to that of a general creditor who has advanced credit upon the faith of the apparent ownership with which the vendor has clothed his vendee.¹ In our Federal courts the doctrine of an implied vendor's lien has not been adopted, except in affirmance of the established local law of some of the different states.² In quite a number of the states the doctrine has never obtained; having been denied and rejected by their courts.³ At one time, however, it prevailed in a majority of the states;⁴ but

¹ Bayley v. Greenleaf, 7 Wheat. 46. "To the world the vendee appears to hold the estate divested of any trust whatever; and credit is given to him in the confidence that the property is his own in equity as well as in law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien." *Id.*

² Bayley v. Greenleaf, *supra*; McLearn v. McLelland, 10 Pet. 625; Chilton v. Braiden, 2 Black. 458.

³ Ahrend v. Odiorne, 118 Mass. 261; Philbrook v. Delano, 29 Me. 410, 415; Brown v. Simpson, 4 Kan. 76; Greco v. Barnard, 18 Kan. 518; Wragg v. Compt. Gen., 2 Desaus (S. Car.), 509, 520; Womble v. Battle, 2 Ired. Eq. (N. Car.), 182; Cameron v. Mason, 7 *Id.* 180; Edminster v. Higgins, 6 Neb. 265; Ansley v. Pasharo, 22 Neb. 662; s. c. 35 N. W. Repr. 885; Chapman v. Beardsley, 31 Conn. 115; Atwood v. Vincent, 17 Conn. 575; Arlin v. Brown, 44 N. H. 102; Heister v. Green, 48 Pa. St. 962; Kauffelt v. Bower, 7 Serg. & R. 64.

⁴ Stultz v. Brown, 112 Ind. 370; s. c. 14 N. E. Repr. 230; 11 West. Repr. 822; Seymour v. McKinstry, 106 N. Y. 230; s. c. 12 N. E. Repr. 34; 8 Cent. Repr. 77; Senter v. Lambeth, 59 Tex. 259; Kent v. Gerhard, 12 R. I. 92; Logwood v. Robertson, 62 Ala. 107; Bratt v. Bratt, 21 Md. 578; Holman v. Patterson, 29 Ark. 357; White v. Denman, 1 O. St. 112; Manly v. Slason, 21 Vt. 271; Francis v. Wells, 2 Colo. 660; Gallagher v. Mars, 50 Cal. 23; Moshier v. Meek, 80 Ill. 79; Pratt v. Clark, 57 Mo. 189; Edwards v. McKernan, 55 Mich. 520; s. c. 22 N. W. Repr. 20; Miss. Valley Co. v. Ry. Co., 58 Miss. 854; Burt v. Wilson, 28 Cal. 632; s. c. 87 Am. Dec. 142; Duke v. Balme, 16 Minn. 306; Wooten v. Belinger, 17 Fla. 289, 300; Corlies v. Howland, 26 N. J. Eq. 311; Ford v. Smith, 1 McArth. 592; Willard v. Reas, 26 Wis. 540; Pease v. Kelly, 3 Or. 417; Ross v. Whitson, 6 Yerg. 50.

latterly it has been expelled by statute from so many of them that its further existence may now be regarded as only a question of time.¹

The general policy prevailing in this country is to make all matters affecting the title to real estate dependent upon record evidence.² "To allow this latent and unwritten lien to prevail against purchasers and mortgagees who, in good faith, invest their money upon the faith of an unincumbered title of record, would be to discredit and subvert the system of registration which, in this country, is universally adopted as the evidence and safeguard of every title."³

It is well settled that, as against a subsequent purchaser of the property without any notice of the lien, and for a valuable consideration fully paid, the implied lien is of no effect; the courts, aside from the registry laws, holding the equity of the purchaser to be superior in such case.⁴ But where the interest of the subsequent party is not strictly

¹ *Brown v. Terrell*, 83 Ky. 418; Gen. Stats. Ky., ch. 63, §24; *Prouty v. Clark*, 73 Iowa, 55; s. c. 34 N. W. Repr. 614; Rev. Code Io., §1940; *Broach v. Smith*, 75 Ga. 159; Rev. Code Ga. (1873), §1997; Gen. Stats. Vt. 452; *Gordon v. Rixley*, 76 Va. 694; *Warren v. Branch*, 15 W. Va. 21; *Harris v. Hanks*, 25 Ark. 510.

² *McCorkle v. Montgomery*, 11 Rich Eq. 132; *McCandish v. Keen*, 13 Gratt. 621; *Bayley v. Greenleaf*, 7 Wheat. 46; *ante*, §19.

³ C. J. Marshall, in *Bayley v. Greenleaf*, *supra*; and see, also, *Ahrend v. Odiorne*, 118 Mass. 261; *Yancey v. Mauck*, 15 Gratt. 300; *Sharp v. Fly*, 9 Baxt. 4.

⁴ *McAlpine v. Burnett*, 23 Tex. 650; *Mackreth v. Symmons*, 15 Ves. 336; *Avent v. McCorkle*, 45 Miss. 221; *Dean v. Scott*, 67 Iowa, 233; s. c. 25 N. W. Repr. 147; *Bankhead v. Owens*, 60 Ala. 457; *Adams v. Buchanan*, 49 Mo. 64; *Moshier v. Meek*, 80 Ill. 79; *Cator v. Pembroke*, 1 Bro. C. C. 301; *Fisk v. Potter*, 2 Abb. App. Dec. 138. On the other hand, a purchaser with actual notice of the lien takes subject to it. *Gordon v. Bell*, 50 Ala. 213; *Dodge v. Evans*, 43 Miss. 570; *Antrey v. Whitmore*, 31 Tex. 623; *Harshburger v. Foreman*, 81 Ill. 364; *Merritt v. Wells*, 18 Ind. 171; *Stroud v. Pace*, 35 Ark. 100; *Carr v. Hobbs*, 11 Md. 285; *Tiernan v. Thurman*, 14 B. Mon. 277; *Ledos v. Kupfrian*, 28 N. J. Eq. 161. The notice may be by recitals in the chain of title. *Willis v. Gay*, 48 Tex. 463; *Daughaday v. Paine*, 6 Minn. 443; *Cordova v. Hood*, 17 Wall, 1; *Thornton v. Knox*, 7 B. Mon. 74; *Masich v. Shearer*, 49 Ala. 226; or by the pendency of a suit to enforce the lien. *Thorpe v. Dunlap*, 4 Heisk, 674. See further as to actual notice, *post*, §§215-245.

that of a purchaser, or of a purchaser for “valuable consideration,” as that term is defined by the courts in this connection,¹ it is held, where the doctrine obtains, to be overridden by this secret and invisible lien, upon the unsatisfactory theory that the lien is in the nature of a resulting trust, and therefore not within the operation of the registry laws.² Thus the implied lien has been held to prevail against a purchaser for value, if chargeable with either actual or constructive notice of the existence of the lien;³ and against holders of subsequent general liens;⁴ and against assignees for the benefit of creditors;⁵ and against purchasers at execution sale with notice, though the lien of the execution creditor attached without notice;⁶ and against purchasers in good faith where the consideration is the satisfaction of an antecedent debt;⁷ and against devisees and mechanics’ liens.⁸ The decided cases as to this implied lien are neither uniform nor consistent, and the decisions of each state separately, where they can be recon-

¹ See as to “valuable consideration” under the registry acts, *post*, §§204-207.

² *Briscoe v. Bronaugh*, 1 Tex. 326; *Senter v. Lambeth*, 59 Tex. 259; *Edwards v. McKernan*, 55 Mich. 520; s. c. 22 N. W. Repr. 20; *Kelly v. Mills*, 41 Miss. 267; *Miss. Valley Co. v. Ry. Co.*, 58 Miss. 854; *Warren v. Fenn*, 28 Barb. 333.

³ *Willis v. Gay*, 48 Tex. 463; *Burt v. Wilson*, 28 Cal. 632; *Dodge v. Evans*, 43 Miss. 570, and cases cited in note above.

⁴ *Kilpatrick v. Kilpatrick*, 23 Miss. 124; *Tucker v. Hadley*, 52 Miss. 414; *Lewis v. Caperton*, 8 Gratt. 148; but see *Sharp v. Fly*, 9 Baxt. 4.

⁵ *Warren v. Fenn*, 28 Barb. 333; *Walton v. Hargrove*, 42 Miss. 18; s. c. 97 Am. Dec. 429; *Green v. DeMoss*, 10 Humph. 371; *Pearce v. Foreman*, 29 Ark. 563; and against an assignee in bankruptcy. *Bowles v. Rogers*, 6 Ves. 95; *Corlies v. Howland*, 26 N. J. Eq. 311; but see *Prouty v. Clark*, 73 Iowa, 55; s. c. 34 N. W. Repr. 614.

⁶ *Senter v. Lambeth*, 59 Tex. 259; *Filley v. Duncan*, 1 Neb. 134; s. c. 93 Am. Dec. 337; *Miss. Valley Co. v. Ry. Co.*, 58 Miss. 854. See *Lissa v. Posey*, 64 Miss. 352.

⁷ *Bailey v. Tindall*, 59 Tex. 530; *Walton v. Hargrove*, 42 Miss. 18; s. c. 97 Am. Dec. 429; *Wells v. Morrow*, 38 Ala. 125; *Pearce v. Foreman*, 29 Ark. 563; *post*, §207.

⁸ *Neil v. Kinney*, 10 O. St. 67. The rights of dower and of homestead held subject to the lien. *Fisher v. Johnson*, 5 Ind. 492; *McHendry v. Reilly*, 13 Cal. 75.

ciled with each other, constitute, as to that state, the law of this subject.¹

§21. Record is Notice to All the World.

The expression that the record is "notice to all the world," or "to all persons," occurs frequently, both in the statutes and decisions.² While, in practical application, this is far from being the case, yet the expression nevertheless embodies the true theory and idea of registration. The limitations of the rule that the record is notice to all the world, when properly considered, can scarcely be justly regarded as such. A very small part of the world has any concern with the property to which a given record relates. The record is notice to so many as are to be affected by it, or as can be properly affected by it, without giving to it an effect that does not naturally and rightfully belong to it. The restriction of its operation is a matter of fact rather than of law. The principal limitation is that the record is notice only to those claiming, under the same grantor, or in the same line of title, and not to persons claiming under a different adverse title.³ The record of a deed is notice that the grantor in that deed has conveyed the property, and that a subsequent conveyance by that grantor of the same property or interest would be fraudulent and unavailing. This notice can justly have no relation to an

¹ In favor of this secret lien the courts violate the established rule in Texas, that a judgment lien will be protected against an unrecorded title or equity, and that notice at a sale under the judgment comes too late if the creditor was without notice when his lien attached. *Grace v. Wade*, 45 Tex. 528; *Senter v. Lambeth*, 59 Tex. 259; and compare *Sharp v. Fly*, 9 Baxt. 4; *Moore v. Holcombe*, 3 Leigh, 397.

² Rev. Stats. of Tex., 4342; *Thompson & Steger's Stats. of Tenn.*, §2073; *Maul v. Rider*, 59 Pa. St. 167, 171.

³ *Ely v. Wilcox*, 20 Wis. 530; *Losey v. Simpson*, 3 Stock. Ch. 246; *Word v. Box*, 66 Tex. 596; *Maul v. Rider*, 59 Pa. St. 167; *Corbin v. Sullivan*, 47 Ind. 356; *Gillett v. Gaffney*, 3 Col. 351; *Baker v. Griffin*, 50 Miss. 158; *Leiby v. Wolf*, 10 Ohio, St. 80; *Iglehart v. Crane*, 42 Ill. 261; *Page v. Waring*, 76 N. Y. 463; *Dolin v. Garner*, 15 Ala. 758; *Stuyvesant v. Hall*, 2 Bark. Ch. 151; *Birney v. Main*, 29 Ark. 591; *Brown v. Simmons*, 44 N. H. 475; *Patty v. Pease*, 8 Paige, 277; s. c. 35 Am. Dec. 683; *Cooper v. Bigley*, 13 Mich. 463.

entirely distinct title which the grantor did not purport to convey, and with which he had no connection; so that the notice cannot, in the nature of things, properly affect an adverse title having a different source, for in this latter case each title is as distinct as if it related to a different property.¹ If the nature of the case is such that third parties can properly be affected by the record, they will be charged with notice, though not claiming in the same line of title. Thus, under the statutes of some of the states, peaceable possession of land under a recorded deed, for a specified time (in Texas five years²), gives absolute title, though the grantor in the deed may have had no title whatever, either of record or otherwise.³ The claim in such cases is usually adverse to every other person, including the legal or true owner, and the record of the deed of the occupying claimant operates as notice to all the world, and is effective against every character of adverse title not asserted by suit within the prescribed period.⁴

§22. Continued—Limitations as to Notice.

There are some other limitations of this doctrine of notice to all the world, of minor importance; a few of them having proper occasion in matters connected with a just and effective operation of the system of registration, and others of them based on technical and trifling considerations, having no substantial merit whatever. They will be considered in detail hereafter; an instance of the latter class

¹ The doctrine of *bona fide* purchasers without notice does not apply as between holders of adverse titles. *McArthur v. Thomas*, 2 Ohio, 415, 420.

² Rev. Stats. of Tex. 3193; *Lambert v. Weir*, 27 Tex. 359; *Tourtelotte v. Pearce* (Neb.), 42 N. W. Repr. 915.

³ *Flanagan v. Boggess*, 43 Tex. 335; *Hunton v. Nichols*, 55 Tex. 217; *Wofford v. McKinna*, 23 Tex. 35.

⁴ But one claiming only by adverse possession and operation of the statutes of limitation, has no right, under the laws of New Mexico (Comp. Laws, 2761-2763), to dispute the title of a holder of an unrecorded deed merely because it is unrecorded. *Armijo v. Armijo*, 13 Pacific Repr. 92.

will suffice for illustration here. It is held in some states, and by the greater weight of authority, though denied in others, that a purchaser cannot, by the record, be charged with constructive notice of conveyances made by his grantor before such grantor acquired his written title as disclosed by the record.¹ This proceeds on the idea that one, in searching the records, ought not to be required to look back of the point where they show the title as vesting in a given person, for conveyances from that person, as it is not to be supposed that any one has mortgaged or conveyed property prior to acquiring his recorded conveyance, and that such a requirement would be inconvenient, as the searcher would not know how far back to look.² As a matter of fact, it is not unusual that equitable interests in land, resting on executory contracts of sale and bonds for title, and even on verbal contracts with possession and improvements, are enjoyed, incumbered and transferred prior to the acquisition of a deed, and prior to the record of the written evidence of such equitable title, if any exists. As a matter of law, the searcher is presumed to know that a conveyance or incumbrance of such equitable interest is authorized and recognized by law, and that, under the rules of law, a conveyance by the party, before he had any interest at all, might afterwards become operative by estoppel as soon as the title had been acquired.³ Having to search the records a little further for a name already under examination, cannot ordinarily impose a very serious hardship, and it is to be regretted that courts should in

¹ *Ely v. Wilcox*, 20 Wis. 523; *Trull v. Bigelow*, 16 Mass. 418; *Somes v. Brewer*, 2 Pick. 484; *Day v. Clark*, 25 Vt. 402; *The State v. Bradish*, 14 Mass. 291; *Farmer's Loan Co. v. Maltby*, 8 Paige, 361; *Doswell v. Buchanan*, 3 Leigh, 365 (23 Am. Dec. 280); *Calder v. Chapman*, 52 Pa. St. 359; 1 *Jones on Mortgages*, §576; *Losey v. Simpson*, 11 N. J. Eq. 246. The rule is denied in *Digman v. McCollum*, 47 Mo. 372; *Tefft v. Munson*, 57 N. Y. 101; and see *Crane v. Turner*, 67 N. Y. 437.

² *The State v. Bradish*, 14 Mass. 291.

³ *White v. Patten*, 24 Pick. 324; *Wark v. Willard*, 13 N. H. 389; *Pike v. Gavin*, 29 Me. 183; *Jarvis v. Aiken*, 25 Vt. 635; *Doyle v. Peerless Co.*, 44 Barb. 239; *Philly v. Sanders*, 11 O. St. 490; *post*, 161.

any instance suffer the benefits of registration to be frittered away by considerations of this kind.¹

§23. Validating Acts.

Numerous acts have been passed in all the states validating the defective record of conveyances.² These various statutes have served to cure almost every kind of defect that could occur; as want of acknowledgment, of certificate, of official seal, of the requisite number of witnesses, of certificates of conformity, and of authority in the officers taking the acknowledgment or recording the instrument. These acts have almost uniformly been held a valid exercise of legislative power.³ Some interesting questions have arisen in their construction and application. Thus, where acknowledgment is essential to render the deed operative between the parties to it, as in case of sheriff's deeds in Missouri, and of married women's deeds where a separate examination is required, defects in the acknowledgment in such cases, unless purely formal, are held not to be healed by statutes validating imperfect records.⁴ Nor will the legis-

¹ The original ground of the rule seems to have been that any conveyance by a party before he had acquired the legal title, was but the conveyance of an equitable interest, and not entitled to protection against a *bona fide* purchaser of the legal estate—a ground no longer tenable. See *Lloyd v. Lloyd*, 4 D. & W. 369; and also, *post*, §89, note 7.

² See *Stimson's Am. Stat. Law*, §§1585, 1626; *Rev. Stats. of Tex.*, 4356; *Rev. Code of Iowa* (1873), §§1966–1968; *Cooley's Const. Lim.* 462, 463.

³ *Bishop v. Schneider*, 46 Mo. 472; s. c. 2 Am. Rep. 533; *Stevens v. Hampton*, 46 Mo. 404; *Raverty v. Fridge*, 3 McLean, 230; *Gillespie v. Reed*, 3 McLean, 377. 383; *Watson v. Mercer*, 8 Pet. 88; *Wallace v. Moody*, 26 Cal. 387; *Logan v. Williams*, 76 Ill. 175; *Tate v. Stoolzfoos*, 16 Serg. & R. 35; s. c. 16 Am. Dec. 546; *Buckley v. Earley*, 72 Iowa, 289; *Brown v. Simpson*, 4 Kan. 76; *Hughes v. Cannon*, 2 Humph. 589; *Barton v. Morris*, 15 Ohio, 408.

⁴ *Ryan v. Carr*, 46 Mo. 483; *Elliott v. Pearsall*, 1 McLean, 11; *contra* as to sheriff's deeds in Indiana; *Doe v. Naylor*, 2 Blackf. 32. Such acts held not to validate tax deeds in Iowa, *Goodykootz v. Olsen*, 54 Iowa, 174; and cannot impair vested rights; *Brinton v. Seevers*, 12 Iowa, 389; *Carpenter v. Dexter*, 8 Wall, 513; *Logan v. Williams*, 76 Ill. 175; nor cure defects in wife's acknowledgment; *Alabama Ins. Co. v. Boykin*, 38 Ala. 510; nor affect rights of third parties, *Green v. Drinker*, 7 Watts & S. 440; *Gatewood v. Hart*, 58 Mo. 261. See, *post*, §94.

lative adoption of a given form of acknowledgment render valid one theretofore taken, though in the exact form afterwards adopted.¹ These validating acts strikingly illustrate the fact that registration is entirely and in every part the creature of the statute; even its rules of construction and judicially engrafted principles being equally subject to legislative control.² They also demonstrate that the numerous preliminaries of record, the vexatious requirements and details as to acknowledgments and certificates thereof, are of no inherent value or substantial importance; since, if it can be properly declared, after a record has been made in a certain way, that it shall be sufficient, it could not be seriously amiss to have previously authorized the form and method thus adopted. It may be further observed that improvements in the registry laws are also of purely legislative origin, and rarely seem to come from any suggestions of the courts that they are needed, or from any judicial criticism of the existing law as being unwise or impolitic. The statutes not infrequently give undue importance to to minor matters, but whatever magnitude they may ascribe to a given particular, the courts usually declare it to be at least that large, if not somewhat larger, and are content to enforce whatever policy may be indicated by the statute, doubtless from the consideration that the legislative department is the exclusive source of the law on this subject.³

¹ Texas Land Co. v. Williams, 51 Tex. 51.

² The legislature may postpone an elder grantee to a younger, if the prior deed be not recorded within the time limited, and this whether such deed be dated before or after the act. Jackson v. Lamphire, 3 Pet. 280. The provision of the Constitution of Louisiana (1868), requiring existing tacit mortgages and privileges to be recorded, under penalty of ceasing to have effect as against third persons, does not impair the obligation of contracts. Vance v. Vance, 108 U. S. 514.

³ The courts at an early day engrafted on the law the doctrine that actual notice supplies registration; *ante*, §1; but judicial improvement of the law seems to have almost ceased with this effort.

CHAPTER 2.

OF THE INSTRUMENTS ENTITLED TO RECORD.

- §24. Object of this chapter.
- 25. Patents.
- 26. Deeds.
- 27. Quit-claims.
- 28. Leases.
- 29. Powers of attorney.
- 30. Mortgages.
- 31. Continued.
- 32. Defeasances.
- 33. Assignments.
- 34. Releases and satisfaction of mortgages.
- 35. Trust deeds.
- 36. Equitable titles.
- 37. Executory contracts.
- 38. Bonds for title.
- 39. Equitable mortgages.
- 40. Conveyances of personal property.
- 41. Chattel mortgages.
- 42. Abstracts of judgments.
- 43. Notices of *lis pendens*.
- 44. Attachment and execution liens.
- 45. Mechanic's liens.
- 46. Mechanic's liens—continued.
- 47. Continued.
- 48. Miscellaneous matters.
- 49. Town plats.
- 50. Record of wills.
- 51. Continued.

§24. Design of this Chapter.

The scope of the registry system, as already stated, has been greatly extended, until it now usually embraces all instruments relating to real property, and in many of the states a considerable part of those affecting personal property, especially conditional sales and chattel mortgages thereof. It will be advisable here to take a

general view of the instruments entitled to record, and to notice such distinguishing features and peculiarities of each as do not, so far as the registry laws are concerned, pertain to them in common. Some important statutory features and distinctions can be better presented here than elsewhere, and it is believed that by this course a general idea of the subject of registration will be attained such as will prove advantageous in its further consideration. The instruments entitled to record may be classed generally, and for the purposes of this chapter, into conveyances of the legal title, conveyances of equitable title, conveyances affecting personal property, and special statutory instruments. In many of the states mortgages are still held to convey the legal estate, as at common law,¹ although in a majority of them the rule now obtains that they convey only an equitable title. Formerly this constituted an important distinction, but since the registry laws have been nearly everywhere extended to embrace equitable as well as legal titles, it now makes but little difference, in this connection, whether mortgages be considered as conveying the one or the other kind of title. Those equitable interests that now present an exceptional feature in the law of registration are not such as

¹ The states in which a mortgage conveys the legal title are: Alabama, Arkansas, Connecticut, Illinois, Maryland, Massachusetts, New Hampshire, Maine, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and West Virginia. *Cahoon v. Miers*, 67 Md. 573; s. c. 11 Atl. Repr. 278; *Darling v. Wilson*, 60 N. H. 59; *Grandin v. Hunt*, 80 Ala. 116; *Morgan v. Way*, 16 Ohio, 469; 1 Jones on Mort. §§17-19.

As a general rule, a chattel mortgage conveys the legal title. *Hill v. Merriman*, 72 Wis. 483; *Jackson v. Cunningham*, 28 Mo. App. 354; *Tabor v. Hamlin*, 97 Mass. 489; s. c. 93 Am. Dec. 113; *Lacey v. Gibony*, 36 Mo. 320; s. c. 88 Am. Dec. 145; *Tannahill v. Tuttle*, 3 Mich. 104; s. c. 61 Am. Dec. 480; *Bryant v. Carsen*, 3 Nev. 313; s. c. 93 Am. Dec. 403; *Kellogg v. Olson*, 34 Minn. 103; s. c. 24 N. W. Repr. 364.

In states other than those mentioned, a mortgage of real estate does not convey the legal title. *Miller v. Shotwell*, 38 La. Ann. 890; *Barney v. H. B. Ins. Co.*, 110 N. Y. 1; *Jones v. Jenkins*, 83 Ky. 391; *Fuller v. O'Neal*, 69 Tex. 349; s. c. 5 Am. St. Rep. 59; 6 S. W. Repr. 181.

pertain to the ordinary form of mortgages and deeds of trust.¹

§25. Patents.

A patent from the government is usually, in this country, the first instrument in the chain of title. Patents being in themselves instruments of a public nature, and a matter of record in the office from which they are issued, it is held, unless the terms of the statute are to the contrary, that they are not embraced among the conveyances required to be recorded in the county where the land lies.² The original record in the general land office from which they are issued is notice to the world of their existence.³ Their registration in the county where the land is situate is usually permissible, and as it helps to render the local record complete, is advisable, though usually not absolutely necessary.⁴

§26. Deeds.

A warranty deed is the usual form of conveyance of title to real estate, and in relation to this form there is little that needs to be said in this connection. By statute in several of the states, an acknowledgment is made

¹ See, *ante*, §§19, 20.

² *Curtis v. Hunting*, 6 Iowa, 536; *Moran v. Palmer*, 13 Mich. 367; *Bernstine v. Smith*, 10 Kan. 60; *Warvelle on Abstracts*, 129; *Franklin v. Kesler*, 28 Tex. 138; *Coles v. Berryhill*, 37 Minn. 58; s. c. 33 N. W. Repr. 213. Where patent issued to an assignee, a subsequent purchaser was protected, though the transfer of the certificate proved a forgery. *Austin v. Dean*, 40 Mich. 386.

³ *Evitts v. Roth*, 61 Tex. 81; *Stevens v. Geiser*, 71 Tex. 140.

⁴ *Rev. Stats. of Tex.* 4329; *Rev Stats. of Wis.* (1878), §2235; *Laws of New York* (1845), p. 110; *Gen. Stats. of Oregon* (1872), ch. 6, §37; *Rev. Stats. of Mo.* (1879), §3826; *Dassler's Comp. Laws of Kan.*, ch. 76, §1. Their registration may be held compulsory under some of the statutes. *Rev. Stats. of Ohio* (1880), §4115; *Rev. Stats. of Ind.* (1881), §470; *Hittell's Cal. Codes* (1876), §6160; *Civ. Code of Dak.* §647; *Comp. Laws of Utah* (1876), §619. So held in *Coles v. Berryhill*, 33 N. W. Repr. 213; s. c. 37 Minn. 58. The delivery of a patent is not essential. *U. S. v. Schurz*, 102 U. S. 378.

an essential part of the execution of deeds by sheriffs and others acting under judicial process, and without it, no title passes by the deed. Where this is the case, it is held that a subsequent act of the legislature validating imperfect acknowledgments and records, does not cure defective acknowledgment of a deed of this kind.¹ Wherever creditors are not specifically mentioned by the terms of the statute as within the protection of the recording acts, it is usually held that an execution deed will not convey title as against an unrecorded *bona fide* deed from the debtor.² This matter, as to which neither the statutes nor the decisions are uniform, is fully treated in a subsequent chapter, and has been already briefly alluded to in considering the rights of creditors under the recording laws.³

§27. Quit-claim Deeds.

It is held by a number of the courts that a grantee under a quit-claim deed is not a *bona fide* purchaser without notice; that the grantor does not thereby affirm the possession of any title, and the grantee takes subject to all equities good against his vendor; and the registry of such a deed does not, therefore, prevail against a prior unrecorded deed from the grantor.⁴ This doctrine is,

¹ Ryan v. Carr, 46 Mo. 483; Curtis v. Millard, 14 Iowa, 128; Spoor v. Phillips, 27 Ala. 193.

² Finch v. Winchelsea, 1 P. Wms. 277; Cover v. Black, 1 Pa. St. 493; Heistner v. Fortner, 2 Binn. 40; s. c. 4 Am. Dec. 417; Plant v. Smythe, 45 Cal. 161; Hackett v. Callender, 32 Vt. 97; 1 Devlin on Deeds, §634.

³ See §10, *ante*, and ch. 8, *post*, §§195-214.

⁴ Johnston v. Williams, 37 Kan. 179; s. c. 1 Am. St. Rep. 243; 14 Pac. Repr. 537; Dickerson v. Colgrove, 100 U. S. 578; Brown v. Jackson, 3 Wheat. 449; May v. Le Claire, 11 Wall. 217; Thorn v. Newsom, 64 Tex. 161; s. c. 53 Am. Rep. 747; Snow v. Lake, 20 Fla. 656; s. c. 51 Am. Rep. 625; Lumber Co. v. Hancock, 70 Tex. 312; Bragg v. Paulk, 42 Me. 502; Leland v. Isenbeck, 1 Idaho, 469; Fleetwood v. Brown, 109 Ind. 571; s. c. 11 N. E. Repr. 779; Smith v. The Bank, 21 Ala. 24; Raymond v. Morrison, 59 Iowa, 371; De Veaux v. Fosbender, 57 Mich. 579; Judge Cooley dissenting; *post*, §183.

To the rule that a quit-claim conveys only the interest of the grantor at the time, there are two exceptions: one, founded on the recording

however, squarely denied in other states, the courts of which hold that as a quit-claim is sufficient to pass the full legal title, the form of the conveyance is immaterial, and that there is no just reason why a purchaser by quit-claim is not entitled to the protection of the registry laws.¹ A statute of Minnesota declared that a deed of quit-claim should be sufficient to pass all the interest which the grantor could lawfully convey by deed of bargain and sale. The courts of that state held that as the grantor could not legally convey what he had already sold to another, this statute would not change the rule that the grantee in such a deed was a purchaser with notice, and not protected by the recording acts.² It is to be noticed that even where the rule obtains that a quit-claim purchaser is a purchaser with notice, the rule is limited to quit-claim deeds in the strict sense of that species of conveyances, and where the legal import is a quit-claim or deed of release of all one's right, title and interest, which is not intended and does not purport to convey an absolute right to land, as contradistinguished from a conveyance of the title or chance of title which the grantor may be supposed to have. If from the terms of the deed, the adequacy of the price paid, or other circumstances, it appears that the grantor intended to convey, and the grantee expected to be invested with, a

acts, *Allison v. Thomas*, 72 Cal. 562; s. c. 1 Am. St. Rep. 89; 14 Pac. Repr. 309; and the other has been recognized in reference to sales made under execution, *Id.* *Roberts v. Bourne*, 23 Me. 165; s. c. 39 Am. Dec. 614; *Ingalls v. Newhall*, 139 Mass. 268.

¹ *Cutler v. James*, 64 Wis. 173; s. c. 54 Am. Rep. 603; 24 N. W. Repr. 874; *Fox v. Hall*, 74 Mo. 315; s. c. 41 Am. Rep. 316; *Craig v. Zimmerman*, 87 Mo. 475; s. c. 56 Am. Rep. 466; *Chapman v. Sims*, 53 Miss. 163; *Brown v. Banner*, 97 Ill. 214; s. c. 37 Am. Rep. 105; *Graff v. Middleton*, 43 Cal. 341; *Pastel v. Palmer*, 71 Iowa, 157; s. c. 32 N. W. Repr. 257. See *post*, §183.

² *Martin v. Brown*, 4 Minn. 282. See, under present statute, *Strong v. Lynn* (Minn.), 37 N. W. Repr. 448.

fee simple title or other particular estate, the purchaser will be entitled to protection.¹

§28. Leases.

A lessee of real estate for a term of years is fully entitled to the protection of the recording acts.² Such leases are usually mentioned specifically in the statutes, the minimum statutory term varying from one to five years.³ So the recording acts apply to mortgages of such leasehold estates as well as to mortgages of freehold estates.⁴ Leasehold interests, and conveyances and mortgages thereof, are not only within the terms, but also within the spirit and intent, of the recording acts, inasmuch as they are equally within the mischief they are intended to remedy; nor do such mortgages come under the provisions relating to the recording of mortgages of personal property, as these latter have reference only to chattels personal.⁵ Actual notice will supply the want of registry of a lease as of a deed;⁶ and possession under the lease

¹ Taylor v. Harrison, 47 Tex. 454; Harrison v. Boring, 44 Tex. 255; Comstock v. Smith, 13 Pick. 116; Van Rensselaer v. Kearney, 11 How. 322; Sweet v. Green, 1 Paige Ch. 473; Flagg v. Mann, 2 Sumn. 426, 561.

² Record v. Williams, 7 Wheat. 59; Bissell v. Nooney, 33 Conn. 411; Jackson v. Dennison, 4 Wend. 558; Spielman v. Kliet, 36 N. J. Eq. 199; McCamant v. Patterson, 39 Mo. 100; Ludlow v. Kidd, 3 O. St. 541, 550. As to the effect and extent of notice from the record, see Libby v. Staples, 39 Me. 166; Everman v. Robb, 52 Miss. 653.

³ In a majority of the statutes, leases are specifically mentioned. See Stimson's Am. Stat. Law, §1624.

⁴ Decker v. Clarke, 26 N. J. Eq. 163; Paine v. Mason, 7 O. St. 198; Berry v. Mutual Life Ins. Co., 2 Johns. Ch. 603; Breese v. Bangs, 2 E. D. Smith, 474. See Williams v. Downing, 18 Pa. St. 60.

⁵ Decker v. Clarke, *supra*; Jones on Mortg., §471.

It will be understood that the general rules stated in this section are subject to a number of exceptions, based upon particular statutes. Thus, in New Jersey, while the lessee who records his lease is given the full benefit of the registry system, yet it is held that the act as to the registry of leases (Rev. Stats., p. 187, §19), is permissive only, and intended solely for the benefit of the lessee, whose rights remain as at common law, if he does not choose to avail himself of the privilege of registry. Hutchinson v. Bramhall, 15 Stew. Eq. (42 N. J. Eq.), 372, reversing s. c. 40 N. J. Eq. 83.

⁶ Weaver v. Coumbe, 15 Neb. 167; Latch v. Bright, 16 Grant's Ch. 613; Anderson v. Harris, 1 Bailey, 315; Corliss v. Corliss, 8 Vt. 475; Whittemore v. Smith, 50 Conn. 376.

is usually sufficient notice;¹ but if the statute in terms requires *actual* notice, the mere constructive notice arising from the lessee's possession has been held not sufficient.²

§29. Powers of Attorney.

The record of a power of attorney, when the statute does not require it to be recorded, does not amount to constructive notice, as the law does not intend that to be known for the existence of which there is no legal necessity.³ The record of a power of attorney is not es-

¹ Beebe v. Coleman, 8 Paige, 392; Sheets v. Allen, 89 Pa. St. 47. See Ferry v. Pfeiffer, 18 Wis. 510; Ala. Ins. Co. v. Oliver, 78 Ala. 158; Smith v. Simmons, 1 Root, 318.

² Wilhelm v. Mertz, 4 Greene, 54; City Council v. Page, Spear's Eq. 159, 212; Lamb v. Pierce, 113 Mass. 72. See Brophy Co. v. B. & D. Co., 15 Nev. 101.

If a statute prescribes that a lease for more than seven years shall not be valid unless recorded, an unrecorded one for ninety-nine years is not good for seven. Brohawn v. Van Ness, 1 Cranch C. Ct. 366; Clift v. Stockdon, 4 Litt. 215. See Chapman v. Gray, 15 Mass. 439; Thomas v. Nelson, 69 N. Y. 118.

The recording or non-recording of a lease only affects subsequent rights of parties claiming under or against a landlord without actual notice, and not its validity as between the parties thereto. 1 Taylor on Land. & Ten. (8th ed.), §171; Stearns v. Morse, 47 N. H. 572; Wood's L. & Ten. §222; Barnum v. Landon, 25 Conn. 137, 149; Baldwin v. Walker, 21 Conn. 168; Enos v. Cook, 65 Cal. 175; Brown v. Matthews, 3 La. Ann. 198; Galpin v. Abbott, 6 Mich. 17; Bridgman v. Wells, 13 Ohio, 43; Anderson v. Harris, 1 Bail. 315; Lake v. Campbell, 18 Ill. 106. But see Anderson v. Critcher, 11 Gill & J. 450; Polk v. Reynolds, 31 Md. 106.

An unrecorded lease, accompanied by the lessee's possession, has been held to be valid in respect to a covenanted renewal of the lease, as between the lessee and a mortgagor of the lessor. Latch v. Bright, 16 Grant's Ch. 653. See Kingston Building Ass'n v. Rainsford, 10 U. C. Q. B. 236; Williams v. Downing, 18 Pa. St. 60.

A deposit of the lease for record, and the clerk's indorsement thereon, is sufficient, although it be not, in fact, recorded in the proper book. Lewis v. Klotz, 39 La. Ann. 259; s. c. 1 South. Repr. 539. As to recording an assignment of a lease, see Martindale v. Price, 14 Ind. 115. See, also, James v. Morey, 2 Cow. 246; Washburn v. Burnham, 63 N. Y. 132; Booth v. Kehoe, 71 N. Y. 341.

³ Williams v. Burbeck, Hoff. (N. Y.), 359; 1 Jones on Mortg. §547; James v. Morey, 2 Cow. 296; Benzein v. Lenoir, 1 Mur. (N. C.), 194.

essential to the validity of a deed made by virtue of it;¹ nor, in the absence of a statute requiring it, is the record of the power necessary to render the record of such deed operative as notice.² So, also, in the absence of a statute, registry is not essential to the validity of a revocation of a recorded power of attorney, and a deed made by virtue of a power which has been revoked, is valid, unless the grantee had notice, actual or constructive, of the revocation.³ From these considerations the necessity of legislative provision for the registry of powers of attorney is apparent. They are now usually mentioned among the instruments authorized to be recorded, and in order to bring the matter more completely within the policy and protection of the law there are, in a number of the states, statutory provisions to the effect that a deed executed by virtue of a power of attorney shall not be valid, or that the record of it shall be of no effect, until the power shall be recorded,⁴ and that no revocation of a recorded power of attorney shall be effectual against third parties until such revocation is also recorded where the power is of record.⁵ When the statute requires the power of attorney to be recorded, if this be not done, the record of a deed made by virtue of it will not operate as constructive notice.⁶ Several of the

¹ *Anderson v. Dugas*, 29 Ga. 440; *Wofford v. McKinna*, 23 Tex. 46; s. c. 76 Am. Dec. 53. If required to be recorded with the deed, the power may be recorded before the deed made under it. *Rosenthal v. Ruffin*, 60 Md. 324. An unrecorded power of attorney held not admissible in evidence. *Watson v. Mercer*, 27 Tex. 637.

² *Wilson v. Troup*, 2 Cow. 195; *Valentine v. Piper*, 22 Pick. 85; s. c. 33 Am. Dec. 715.

³ *Hancock v. Byrne*, 2 Dana, 40; 2 Kent's Coms. 644; *Wiele v. U. S.*, 7 Ct. Cl. 539.

⁴ *Stimson's Am. Stat. Law*, §§1654, 1670; *Hughes v. Wilkinson*, 37 Miss. 482; *Hager v. Spect*, 52 Cal. 579; *Lowry v. Harris*, 12 Minn. 255; *Herndon v. Bascom*, 8 Dana, 113; *Rev. Stats. of Ohio*, 4132; *Hagerman v. Sutton*, 61 Mo. 519; s. c. 4 S. W. Repr. 73.

⁵ Special provision as to recording a revocation of a power of attorney is to be found in the statutes of twenty-one states. See *Stimson's Am. Stat. Law*, §1673; *Rev. Stat. of O.* 4109.

⁶ *Graves v. Ward*, 2 Duv. 301; *Carnall v. Duval*, 22 Ark. 136; *Lowry v. Harris*, 12 Minn. 255.

statutes provide that the acknowledgment of a deed made by an attorney under a power shall state that he subscribed both the name of his principal and his own name as attorney in fact.¹ It is the common practice for an acknowledgment by an attorney, in states where no statute requires it, to be in this form, or at least to declare that the attorney executed the instrument "in the capacity therein set forth."²

§30. Mortgages.

The law of registration applies to mortgages as it does to deeds, except where the statute makes a difference, or the nature of the matter necessarily demands it.³ The temporary nature of the interests they convey, however, and the necessity of provision for their transfer and release by record, together with their frequent use for commercial purposes, and the changes of the law as to the character of the mortgagee's estate, have induced much statutory legislation with reference to their registry, and many perplexing questions have arisen thereon. To prevent fraud and collusion in their use for the purpose of covering up property from creditors, it is required in a few instances that they shall be accompanied by an affidavit of the mortgagee to the effect that the consideration in the mortgage is true and *bona fide* as therein set forth.⁴ And in those states wherein time is given

¹ Hittell's Cal. Codes, §6192; Civ. Code of Dak. §666; Flanagan v. Brown, 70 Cal. 254.

² See. *post*, §59.

³ 1 Hilliard on Mortgages, 711; Steffian v. Bank, 69 Tex. 515; Seevers v. Delashmut, 11 Iowa, 174; s. C. 77 Am. Dec. 179; Johnson v. Stagg, 2 Johns. 510; Shannon v. Hall, 72 Ill. 354; Hickman v. Perrin, 6 Cald. (Tenn.), 135; Cook v. Parham, 63 Ala. 476; Van Aken v. Gleason, 34 Mich. 477; Salter v. Baker, 54 Cal. 140; Whelan v. McCreary, 64 Ala. 319; Chapman v. Miller, 130 Mass. 289.

⁴ Milholland v. Tiffany, 64 Md. 455; s. C. 2 Cent. Repr. 632. Such an affidavit is required in Delaware, Maryland, Ohio, New Hampshire, Vermont, California, Arizona and Idaho. In a few of them it is required only as to chattel mortgages. See Jones on Chat. Morts., §§36, 37; *post*, §271.

within which conveyances may be recorded with right of priority, a less time, if any at all, is usually allowed as to mortgages. In the absence of any statute affecting the matter, mortgages are, as between the parties thereto and as to third parties with notice thereof, good and effectual, and, of course, create a lien, without registry; but in a few of the states registration is made essential to the existence of the lien.¹

§31. Mortgages, continued.

A mortgage is an incumbrance to secure a debt, and the extent of the incumbrance is, of course, dependent on the amount of the debt; so that it is a matter materially affecting the rights of subsequent incumbrancers and purchasers of the property that the record shall distinctly and correctly show the amount of the mortgage indebtedness. In a few cases the record of mortgages has been held to great strictness in this particular, but the tendency of the decisions is to hold that where the indebtedness is so stated or made to appear that it can be ascertained or made certain by estimate, reasonable inquiry, or reference to other records, it is sufficient.² Where, through mistake in transcribing, the record fails to show the proper and full amount of the debt, it is held in some states to be notice of a lien for only the amount mentioned in the record;³ and in other states, by virtue of the statutes as to filing, the record is held to be notice of the full amount stated in the mortgage.⁴ Several mortgages executed at the same time on the same

¹ *Dodd v. Parker*, 40 Ark. 536, 540; *Stansell v. Roberts*, 13 Ohio, 148; *Mayham v. Coombs*, 14 O. 428; *Taylor v. Doe*, 13 How. 287; *Robinson v. Willoughby*, 70 N. C. 358; *Fleming v. Burgen*, 2 Ired. Eq. 584; *Wright v. Graham*, 42 Ark. 141.

² *Youngs v. Wilson*, 27 N. Y. 351; *Lash v. Edgerton*, 13 Minn. 210; *Dean v. De Lezardi*, 24 Miss. 424; *Hinchman v. Town*, 10 Mich. 508.

³ *Frost v. Beekman*, 1 Johns. Ch. 288, and cases cited in notes to §17, *ante*.

⁴ *Mims v. Mims*, 35 Ala. 23; *Bryden v. Campbell*, 40 Md. 331, and cases cited in §§17 and 18, *ante*.

property, as to secure purchase money, are concurrent liens, whether in the hands of the mortgagee or his assignees, and the record of one before the other is of no effect.¹ Priority of mortgages is in some instances determined by priority of record, even in those states whose statutes do not determine precedence by the order of record.² Aside from this statutory rule, priority may be determined by contract or understanding of the parties, by actual notice, and a variety of equitable considerations.³ Many of the statutes provide that mortgages shall be recorded in books kept separate from those for other instruments, and where this is the case, the record of a mortgage proper in the book for deeds is ineffectual, and this has been held in a number of instances even where the mortgage was in the form of a deed absolute, the condition of defeasance being in parol.⁴ The current of authority and the better reason, however, support the view that the record of the absolute instrument in the book of deeds sufficiently protects the rights of the grantee therein, although he be in fact only a mortgagee.⁵

¹ *Gansen v. Tomlinson*, 23 N. J. Eq. 405; *Vredenburg v. Burnett*, 31 N. J. Eq. 229; *Douglass v. Peele*, *Clarke* (N. Y.), 563; *Stafford v. Van Rensselaer*, 9 Cow. 316; 1 *Jones on Mortgages*, §566; *Howard v. Chase*, 104 Mass. 249; *Greene v. Warnick*, 64 N. Y. 220.

² *Ante*, §§13-15; *post*, §§165-168. As to priority by statute, see *Moore v. Thomas*, 1 Or. 201; *Dungan v. Am. Life Ins. Co.*, 52 Pa. St. 253; *Den v. Roberts*, 4 N. J. L. 315; *Mayham v. Coombs*, 14 O. St. 110; *Nat'l Bank v. Whitney*, 103 U. S. 99; *Burns v. Berry*, 42 Mich. 176.

³ *Howard v. Chase*, 104 Mass. 249; *Hendrickson's Appeal*, 24 Pa. St. 363; *Jones v. Phelps*, 2 Bark. Ch. 440; *Van Aken v. Gleason*, 34 Mich. 477; *Pomeroy v. Latting*, 15 Gray, 435; *Rhodes v. Canfield*, 8 Paige, 545; 1 *Jones on Mort.* §§566-7.

⁴ *Calder v. Chapman*, 52 Pa. St. 359; *McLanahan v. Reeside*, 9 Watts, 508; s. c. 36 Am. Dec. 136; *Friedley v. Hamilton*, 17 Serg. & R. 70, Judge Tod dissenting; *Cordeviolle v. Dawson*, 26 La. Ann. 534; *Fisher v. Tunnard*, 25 *Id.* 179; *Brown v. Dean*, 3 Wend. 213; *Grimstone v. Carter*, 3 Paige, 421; s. c. 24 Am. Dec. 230; *Dey v. Dunham*, 2 Johns. Ch. 182; *Warner v. Winslow*, 1 Sand. Ch. 430; *Ives v. Stone*, 51 Conn. 446; *Gully v. May*, 84 N. C. 434, 440; *Purdy v. Huntington*, 42 N. Y. 343; s. c. 1 Am. St. Rep. 532; *Show v. Wiltshire*, 65 Me. 485; *Gregory v. Perkins*, 4 Dev. 53.

⁵ *Haseltine v. Espy*, 13 Or. 301; *Mobile Bank v. Tishamingo*, 62 Miss. 250; *Seymour v. Darrow*, 31 Vt. 122; *Clemons v. Elder*, 9 Iowa, 273;

§32. Defeasances.

Frequently, where the mortgage consists of a deed absolute, with a separate defeasance, written or verbal, the question has arisen as to the effect of recording the deed alone, without any record of the defeasance; and it has been held in as many as five states¹ that the record in such case is ineffectual for any purpose.² The New York cases to this effect are based on the express terms of the statute of that state; but the others are rested largely on the reason of the matter; it being contended that such a record is not notice of a deed, because the instrument is not in reality a deed, nor is it notice of a mortgage, because the record does not show a mortgage. The current of authority, however, is that as a purchaser may rely upon the title as he finds it of record, the rights of the mortgagee in such case are fully protected, without a record of the defeasance.³ The record of the deed being notice of even a greater interest than the mortgagee has, sufficiently protects him; and should the mortgagor fail to record the defeasance, he is the one who must suffer the consequences, should any ensue.⁴ An

Grellett v. Heilshorn, 4 Nev. 526; *Harrison v. Phillips*, 12 Mass. 456; *DeWolf v. Strader*, 26 Ill. 231; *Young v. Thompson*, 2 Kan. 83; *Kemper v. Campbell*, 44 O. St. 210; *Benton v. Nicholl*, 24 Minn. 221. See, *post*, §132, where this subject is more fully presented.

In *Smith v. Smith*, 13 O. St. 532, the statute requiring mortgages and absolute conveyances to be recorded in separate books, was held to be merely directory, and not to vitiate the record if not made as directed. See, also, as to considerations determining the proper place of record, *Beals v. Hale*, 4 How. 37.

¹ Pennsylvania, New York, Connecticut, North Carolina and Louisiana.

² *Hendrickson's Appeal*, 24 Pa. St. 363; *Luch's Appeal*, 44 *Id.* 519; *James v. Morey*, 2 Cow. 246; s. c. 14 Am. Dec. 475; *Jaques v. Weeks*, 7 Watts, 261; *Edwards v. Trumbull*, 50 Pa. St. 509; *Jackson v. Van Valkenburg*, 8 Cow. 260; *Holcombe v. Ray*, 1 Ired. L. 340, and cases cited in the last note but one of the preceding section.

³ The cases are cited in the last note to the preceding section.

⁴ *Cogan v. Cook*, 22 Minn. 137; *Bailey v. Myrick*, 50 Me. 171; *Tufts v. Tapley*, 129 Mass. 380; *Stoddard v. Rattan*, 5 Bosw. 378; *Fielder v. Darrin*, 59 Barb. 651; *Digby v. Jones*, 67 Mo. 104; *Pico v. Gallardo*, 52 Cal. 206; *Newberry v. Bulkley*, 5 Day, 384; *Columbia Bank v. Jacobs*, 10 Mich. 349; s. c. 81 Am. Dec. 792.

objection to the prevailing rule, and the one most strongly insisted on in the North Carolina and Connecticut cases, is that it enables the mortgagor to collusively cover up his interest in the property, and also enables the mortgagee to obtain credit on the strength of an apparent title that does not really exist.¹ To prevent such an effect of the record, it has been enacted by statute in a number of the states that the mortgagee shall derive no benefit from the record of the deed, unless the defeasance is also recorded.² In other states there is statutory provision that as to third parties the absolute conveyance is not defeated or affected, unless the defeasance is recorded;³ although this would be the general rule without any statute to that effect. In at least one state it is required that the condition of defeasance must be embodied in the instrument of conveyance itself.⁴ These statutes are of salutary effect, whether intended to protect the rights and interests of parties dealing either with the mortgagor or with the mortgagee.

§33. Assignments of Mortgages.

It has been held that the record of an assignment of a mortgage was not notice, unless expressly authorized by statute.⁵ The contrary has also been held;⁶ but the

¹ See, *post*, §§136-138; *Ives v. Stone*, 51 Conn. 446.

² Rev. Code of Del. 1874, p. 504; Rev. Code of Md. 1878, art. 66, §42; *Owens v. Miller*, 29 Md. 144; Comp. Stats. of Neb. 1881, p. 390; 2 Rev. Stats. of N. Y. 1875, p. 1138; Rev. Stats. of N. J., *Mortgages*, §21; 1 *Jones on Mortg.* §548.

Since the act of 1881, a written defeasance signed by the grantee, but unacknowledged and unrecorded, though contemporaneous with the execution of the deed absolute, is not admissible in evidence to show it a mortgage, and actual notice of it is of no avail. *Sankey v. Hawley*, 118 Pa. St. 30, and see *Pancake v. Cauffman*, 114 *Id.* 13.

³ Rev. Code of Dak. 1877, §1641; Civ. Code of Cal. §§2950, 2952; Code of Ala. §2168; Rev. Stats. of Wis. §2243; Rev. Stats. of Ind. §2932; and Statutes of Mass., Maine, Penn., Mich., Kan., Oregon and W.oming. *Jones v. Hudson*, 23 S. Car. 494.

⁴ Gen. Laws of N. H. 1878, ch. 136. §2.

⁵ *Gordon v. Rixley*, 76 Va. 694, 701; *Watson v. Dundee*, 12 Or. 474; *Oregon Trust Co. v. Shaw*, 5 Saw. 336; *Dixon v. Hunter*, 57 Ind. 278; *Reeves v. Hayes*, 95 Ind. 521.

⁶ *Pepper's Appeal*, 77 Pa. St. 373; *post*, §§174, 209.

question is now settled by statute in a large number of the states.¹ The assignee is usually regarded as a purchaser entitled to the protection of the recording acts against a prior unrecorded mortgage of which his assignor had actual notice, but of which he had none.² Unless the assignment is recorded, it is invalid against a subsequent purchase, without notice, of the mortgage from the mortgagee,³ but its record is not necessary as against a purchaser of the property from the mortgagor.⁴ As against such latter purchaser, the record of the mortgage itself is notice, and a failure to record the assignment does not blot out the record of the mortgage.⁵ The record of an assignment is not notice of it to the mortgagor, so as to invalidate payments subsequently made by him to the mortgagee.⁶ This rule is declared by

¹ See Rev. Stats of Ind. 1831, §1093; Hittell's Cal. Codes, §7934; Civ. Code of Dak. §1735; Rev. Stats. of Tex. §4331; Rev. Code of Md. (1878), art. 44, §§37, 38; *Belden v. Meeker*, 47 N. Y. 307; *Bowling v. Cook*, 39 Iowa, 200; *Stein v. Sullivan*, 31 N. J. Eq. 409; *Smith v. Keohane*, 6 Bradw. (Ill.), 585; *post*, §174; *Jones on Mort.* §472.

² *Westbrook v. Gleason*, 79 N. Y. 23; *Decker v. Boyce*, 83 N. Y. 215; 1 *Jones on Mort.* §275.

One who, in good faith and for value, takes an assignment of a recorded mortgage, is not bound by a prior agreement that the mortgage should not be recorded, though its record was a fraud on other parties who relied on such agreement. *Cook v. Stone*, 63 Iowa, 352.

³ *Henderson v. Pilgrim*, 22 Tex. 464; *The Conn. Co. v. Talbot*, 113 Ind. 373; *James v. Johnson*, 6 Johns. Ch. 417; *Bowling v. Cook*, 39 Iowa, 200; *Bacon v. Van Schoonhoven*, 19 Hun. 158; s. c. 87 N. Y. 446.

⁴ *Oregon Trust Co. v. Shaw*, 5 Saw. 336; *Campbell v. Vedder*, 3 Keyes, 174. Under certain circumstances, however, a failure to record the assignment will subject the assignee to the equities of a junior mortgagee. See *Parmenter v. Oakley*, 69 Iowa, 388; s. c. 28 N. W. Repr. 653. And where the assignee had failed to record his assignment, and the mortgagee discharged the mortgage of record, the rights of an innocent purchaser of the property prevailed over those of the assignee. *Ladd v. Campbell*, 56 Vt. 529. See also, *Daws v. Craig*, 62 Iowa, 515; *Clark v. Mackin*, 30 Hun. 411; *Girardin v. Lamp*, 58 Wis. 267; and, *contra*, *Brayley v. Ellis*, 71 Iowa, 155; s. c. 32 N. W. Repr. 254.

⁵ *Enos v. Cook*, 65 Cal. 175; s. c. 3 Pac. Repr. 632; *Sprague v. Rockwell*, 51 Vt. 401; *Bridges v. Bidwell*, 20 Neb. 185; s. c. 29 N. W. Repr. 302; *Viele v. Judson*, 82 N. Y. 32; 1 *Jones on Mort.* §474.

⁶ *Hubbard v. Turner*, 2 McLean, 533; *N. Y. Life Co. v. Smith*, 2 Barb. Ch. 82; *Murray v. Lylburn*, 2 Johns. Ch. 443; *Ely v. Schofield*, 35 Barb. 330.

statute in a number of states,¹ while in a few it is declared, to the contrary, that such record is notice to all persons, including the mortgagor.² It is said that the reason of the rule is that the mortgagor should be saved the necessity of examining the records every time a payment is to be made; a rather unsatisfactory one for an exception to a leading principle of registration, that a record authorized to be made, and duly made, is notice to the world.

§34. Release and Discharge of Mortgages.

A release of mortgaged premises is a conveyance affecting real estate, which must be recorded to be valid against a subsequent purchaser of the mortgage for value and without notice.³ In a majority of the states special provision is made by statute for entering satisfaction and discharge of mortgages; usually by an entry at the foot,

Where the assignment was not recorded, and the mortgagor made a part payment to the mortgagee, which was not credited, either on the notes or the mortgage, it was held that the rights of the assignee were not affected by such payment. Had the mortgagor demanded a proper credit of the payment, this would have disclosed that the notes and mortgage had been assigned. This case said not to conflict with the rule laid down in *Bowling v. Cook*, 39 Iowa, 200, and *Carnog v. Fuller*, 30 *Id.* 212; *Brayley v. Ellis*, 71 Iowa, 155; s. c. 32 N. W. Repr. 254.

An assignment of a mortgage was written on the back of it, reciting that it was an assignment of "the within mortgage." It was recorded in the same volume with the mortgage, but on a different page, with cross-references from one to the other—and the record was held sufficient. *Soule v. Corbley* (Mich.), 31 N. W. Repr. 785; 8 West. Repr. 151. For further cases on this subject, see *post*, §174.

Though the statute provides for recording assignments of mortgages, yet an equitable assignment held not within nor affected by the statute. *Byles v. Tome*, 39 Md. 461; Rev. Code, art. 44, §§37, 38. An innocent assignee for value, ordinarily takes subject to the equities existing between the mortgagor and mortgagee. *Moffatt v. Hardin*, 22 S. Car. 9.

¹ Howell's Stats of Mich. §5687; Rev. Stats of Wisconsin, §2244; Gen. Stats. of Minn. 1878, ch. 40, §24; Stimson's Am. Stat. Law, §1870; *Ely v. Schofield*, 35 Barb. 330.

² Rev. Stats. of Ind. 1881, §1094; Rev. Stats. of N. J., 1877, *Mortgages*, §32; *Jones on Mortgages*, §473. See *post*, §§174, 203, 209.

³ *Mutual Life Ins. Co. v. Wilcox*, 55 How. Pr. (N. Y.), 43; *Blunt v. Morris*, 123 Mass. 55; *Jones v. Chamberlain*, 5 Heisk. (Tenn.), 210; *Palmer v. Bates*, 22 Minn. 532.

or on the margin, of the record of the mortgage.¹ These statutes usually provide further that the discharge may also be made by the common form of a separate deed of release or quit-claim;² a provision made necessary by the fact that it is often not practicable for the mortgagee to appear before the recorder to authorize the entry in shorter form. The California Code provides that the mortgagee, or his assignee, may "acknowledge the satisfaction of the mortgage" before the recorder, who certifies the acknowledgment in the margin of the record.³ A mortgage had been given to secure several notes, the first of which was paid, and this entry made on the record: "Full payment and satisfaction of the within note and mortgage hereby acknowledged." It was contended that this was not a full discharge of the mortgage; that as the mortgage showed other notes, not then due, this entry showed them not paid; but the court held that the matter with respect to the payment of "the note" was not properly of record as part of the marginal entry, and that part of it was, therefore, not constructive notice.⁴ In North Carolina it is held that when the mortgage debt is settled, the mortgage is in equity no longer operative, though no satisfaction be entered of record.⁵

¹ Code of Ala. §2222; Stimson's Am. Stat. Law, §1905. Usually the mortgagee must acknowledge satisfaction in the presence of the register, or sign the entry in the record, which must be attested by the register. In South Carolina, satisfaction of a mortgage does not, as a deed, require two witnesses. Gen. Stats., 1872, pp. 427-8; *City Council v. Ryan*, 22 S. C. 339.

² Rev. Laws of Vermont, 1880, §1952; Pub. Stats. of Mass., 1882, ch. 120, §§24, 26.

³ Civ. Code, §2938.

⁴ *Beal v. Stevens*, 72 Cal. 451; s. c. 14 Pac. Repr. 186. Where the mortgage was to secure the payment of an annuity to a minor, and the trustee wrongfully entered a discharge and satisfaction in full of it, a party subsequently dealing with the property was held chargeable with constructive notice that such release was unauthorized. *McPherson v. Rollins*, 107 N. Y. 317; 14 N. E. Repr. 411. See *post*, §175.

⁵ *Walker v. Mebane*, 90 N. C. 259.

§35. Deeds of Trust.

A deed of trust is technically a deed, and its execution and acknowledgment in such manner as is required by statute in case of deeds, is sufficient.¹ A trustee in a deed of trust, unless a general trustee for the benefit of creditors, is a purchaser for value, and is not affected with any infirmity in the grantor's title of which he had not notice.² It has been held in some Pennsylvania cases that a purchaser from a *cestui que trust* is affected with notice of outstanding latent equities, and cannot perfect his title by obtaining a conveyance from the trustee;³ but these decisions are against the weight and current of the authorities.⁴ The interest of a trustee is such as to disqualify him, as an officer, from taking the acknowledgment to the deed of trust.⁵ The record of a trust deed or mortgage, with power of sale, has been held to charge subsequent purchasers with notice of the fact that a sale has been made under the power, although the deed was unrecorded.⁶

§36. Conveyances of Equitable Title.

As already stated,⁷ it was held in many early cases that the registry acts applied only to conveyances of the legal title, and that equitable interests were not included

¹ *Branch v. Atlantic Ry. Co.*, 3 Woods, 481. A trust deed is but a mortgage with power of sale. *McLane v. Paschal*, 47 Tex. 364; *post*, §210. But this rule does not obtain in Louisiana. *Thibodeaux v. Anderson*, 34 La. Ann. 797.

² *Fargason v. Edrington*, 49 Ark. 207, 214; s. c. 4 S. W. Repr. 763; *Kesner v. Trigg*, 98 U. S. 50; *Wickham v. Lewis*, 13 Gratt. 427; *New Orleans, etc., Co. v. Montgomery*, 5 Otto (95 U. S.), 18; *post*, §211.

³ *Ingersoll v. Sergeant*, 7 Barr. 340; 3 Harris, 343; *Kramer v. Arthurs*, 7 Barr. 161.

⁴ *Sumner v. Vaughn*, 56 Ill. 539; *Zollman v. Moore*, 21 Gratt. 313; *Correy v. Caxton*, 4 Binn. 140; *Flagg v. Mann*, 2 Sumn. 486, 518; *Bellas v. McCarty*, 10 Watts, 257.

⁵ *Jones v. Porter*, 59 Miss. 628; *Brown v. Moore*, 38 Tex. 645; *Stevens v. Hampton*, 46 Mo. 404; *Darst v. Gale*, 83 Ill. 136; *Bennett v. Shipley*, 82 Mo. 448. See *post*, §67.

⁶ *Heaton v. Prather*, 84 Ill. 330; *Farrar v. Payne*, 73 Ill. 82; See *post*, §210.

⁷ *Ante*, §20.

within them.¹ Courts of equity, it was said, could afford proper relief to equitable claimants aside from the aid of the registry laws.² The distinction, however, between courts of law and equity has been largely, and in some states entirely, abolished; and a growing theory of modern jurisprudence is that law and equity are, or ought to be, the same. Salutory legislation is rightly directed to whatever subject matter it can properly affect, without distinction as to the forum or form of remedy, and no just reason can be shown for exempting any interest in real property from the operation of the recording acts, because of a technical difference of name. By force of statute and decision together, it is now settled as a rule almost without exception,³ that the registry laws apply to all conveyances affecting real estate, of whatever character.⁴

¹ *Morton v. Robards*, 4 Dana, 258; *Corn v. Sims*, 3 Met. 391; *Doswell v. Buchanan*, 3 Leigh. 376; s. c. 23 Am. Dec. 280; *Grimstone v. Carter*, 3 Paige, 421; *Briscoe v. Ashley*, 24 Gratt. 454, 476; *Morecock v. Dickens*, Amb. 678; *Swigert v. The Bank of Ky.*, 17 B. Mon. 268; *Kelley v. Mills*, 41 Miss. 267; *Jaques v. Weeks*, 7 Watts, 261; *Laverty v. Moore*, 32 Barb. 347; s. c. 33 N. Y. 658. See *Preston v. Nash*, 76 Va. 1, qualifying *Doswell v. Buchanan*, *supra*.

² *Grimstone v. Carter*, *supra*.

³ The exceptions principally relate to wills, as to which see, *post*, §48; leases for a limited term of years, powers of attorney and executory contracts, as to which see Rev. Stats. of Ind., 1881, §2956; *Stimson's Am. Stat. Law*, §1551.

⁴ *Herrington v. Williams*, 31 Tex. 448; *Smith v. Neilson*, 13 Lea, 461; *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Wilder v. Brooks*, 10 Minn. 50; *Fish v. Benson*, 71 Cal. 428; s. c. 12 Pac. Repr. 454, and cases cited in notes to §20, *ante*. As to registry of a conveyance of an equitable title not protecting against a purchase of the legal title from one who appears by the record to be the real owner, see *Tarbell v. West*, 86 N. Y. 280; *Carson v. Phelps*, 40 Md. 73, and *Irish v. Sharp*, 89 Ill. 261. In New York, although an agreement to convey land is held not within the recording acts (*Ludlow v. Van Ness*, 8 Bosw. 178), yet where one is in possession under a written contract of this kind, its record is sufficient notice to subsequent grantees or incumbrancers of the character of his possession. *Laverty v. Moore*, 33 N. Y. (6 Tiff.), 658; s. c. 32 Barb. 347.

So, it is held that the registry of a conveyance of an equitable title is notice to a subsequent purchaser of the same interest or title from the same grantor, but is not notice to a purchaser of the legal title from the

§37. Executory Contracts.

The law of registration is not uniform as to executory contracts. In a number of states they are, by the terms of the recording acts, excluded from their operation¹; in others they are included, either specifically, or by the use of such terms as necessarily include them.² Thus, in Texas, the statute provides for the registry of "all instruments relating to any lands,"³ and this is held to include executory contracts.⁴ Unless their registration be provided for by statute, such contracts would gain nothing by being recorded.⁵ In Minnesota an executory contract is recordable, but priority in its record does not give it preference over a deed given before the execution of the contract.⁶

§38. Bonds for Title.

Bonds for title are usually within the recording acts.⁷ Although a species of executory contract, they are so nearly allied to conveyances of title as to come within person who appears by the record to be the real owner. *Tarbell v. West*, 86 N. Y. 280.

One who acquires the legal title with notice of the equitable rights of another, under a contract, takes subject to those rights. *Hilton v. Young*, 73 Cal. 196; s. c. 14 Pac. Repr. 684. An earlier mortgage on an equitable interest given preference over a later one, executed after the mortgagor had acquired the legal estate. *Edwards v. McKernan*, 55 Mich. 520; s. c. 22 N. W. Repr. 20; and see also, *Putnam v. White*, 76 Me. 551.

¹ See statutes of Dakota, Indiana, Minnesota, Montana, Nebraska, New York, Michigan, Wisconsin and Wyoming. *Lavery v. Moore*, 33 N. Y. 658.

² Rev. Stats. Ind. (1881), §2957; *Case v. Burnstead*, 24 Ind. 429; and see statutes of Missouri and Arkansas. "Any instrument affecting the title to, or possession of, real property." Illinois, Kansas, California, Colorado. *Allen v. Woodruff*, 96 Ill. 11.

³ Rev. Stats of Texas, 4331, also 4333, 4334.

⁴ *Ranney v. Hogan*, 1 Tex. U. Cas. 283; *Miller v. Alexander*, 8 Tex. 45.

⁵ *Messick v. Sunderland*, 6 Cal. 297; *Ludlow v. Van Ness*, 8 Bosw. 175.

⁶ *Thorson v. Perkins* (Minn.), 40 N. W. Repr. 557.

⁷ *McFarran v. Knox*, 5 Cold. 217; *Morgan v. Snell*, 3 Baxt. 382; *Schuster v. La Londe*, 57 Tex. 28; *Catlin v. Bennett* 47 Tex. 165; *Derr Dellinger*, 75 N. C. 300.

the law wherever its terms do not expressly forbid it.¹ Where one bought land for which he received a bond for title, instead of a deed, conditioned that the legal title should be conveyed to him as soon as the land was paid for, which bond was duly recorded, and before paying for the land the purchaser mortgaged his interest, and subsequently the mortgagor, to meet the demands of his grantor, executed another mortgage to a different party, and with the proceeds paid for the land; it was held that the release of the vendor's lien enured to the benefit of the first mortgagee, and the second mortgagee, by the record of the title bond and the first mortgage, was charged with notice of the rights thereby secured.²

§39. Equitable Mortgages.

In Wisconsin it is held that the record of a mortgage of an equitable estate is notice to, and takes precedence of a deed to, any subsequent purchaser of the property.³ This is the rule generally, and what has been said with reference to equitable titles applies to equitable mortgages as well.⁴ Such a mortgage, if first recorded, is usually preferred to a mortgage of the legal estate.⁵ The rule, however, is not universal that the record

¹ *Scarborough v. Arrant*, 25 Tex. 129, 132. But an assignment of a bond held not recordable. *Kelly v. Thompson*, 2 Heisk. 281.

² *Alderson v. Ames*, 6 Md. 52; *Clamorgan v. Lane*, 9 Mo. 446; *Wade on Notice*, §254; *Todd v. Outlaw*, 79 N. C. 236; *Butler v. Maury*, 10 Humph. (Tenn.), 420.

In Kentucky it is held that the registry acts relate to conveyances of the legal title only, and not to bonds or other evidences of mere equitable title. *Corn v. Sims*, 3 Met. 401, decided in 1860; *Morton v. Robards*, 4 Dana, 260; *Nelson v. Boyce*, 7 J. J. Marsh, 401.

³ *Jarvis v. Dutcher*, 16 Wis. 307; *Edwards v. McKernan*, 55 Mich. 520.

⁴ *Ante*, §36, and cases there cited; *Hunt v. Johnson*, 19 N. Y. 279; *Gen. Ins. Co. v. U. S. Ins. Co.*, 10 Md. 517; s. c. 69 Am. Dec. 174; *Bank of Greensboro v. Clapp*, 76 N. C. 482; *Putnam v. White*, 76 Me. 551.

⁵ *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. 381. See *Edwards v. McKernan*, 55 Mich. 520; s. c. 22 N. W. Repr. 20, in which the court were equally divided as to the priority accorded by the lower court to an equitable mortgage over a subsequent one of the legal estate.

of an equitable mortgage is notice to a purchaser of the land from the holder of the legal title.¹ Equitable mortgages arising by deposit of title deeds, as being contrary to the statute of frauds and to the spirit and operation of our American registry system, are not usually, though sometimes, recognized in this country.²

§40. Personal Property.

The general principles of the doctrine of notice by registration apply to personal property substantially as to real estate, wherever the law requires the record of instruments relating to personal property.³ In determining, however, what instruments are required to be recorded, the rule as to real and as to personal property is different. The settled construction is that the law contemplates and requires the record of all conveyances affecting real estate, and the application of this rule serves, in a large measure, to relieve this question of its difficulties, so far as real property is concerned. Thus, although the language of the statute as to the record of this latter class of instruments may be only permissive, yet it is held that they are thereby required to be recorded, and are brought fully within the consequences that attach to a failure to register.⁴ But this construction will not be applied with reference to personal property, for the reason that as to it the general rule does

¹ *Tarbell v. West*, 86 N. Y. 280; *Halsteads v. Bank of Ky.*, 4 J. J. Marsh. 554; *Irish v. Sharp*, 89 Ill. 261; 1 *Jones on Mortgages*, §469.

² *Gale v. Morris*, 29 N. J. Eq. 222; *Hutzler v. Phillips*, 26 S. Car. 136; s. c. 1 S. E. Repr. 502; *Jarvis v. Dutcher*, *supra*.

³ *Wade on Notice*, §§67, 68; *Reed v. Gannon*, 50 N. Y. 345; *Parker v. Middlebrook*, 24 Conn. 207; *Saltus v. Everett*, 20 Wend. 267; *Crocker v. Crocker*, 31 N. Y. 507. This is more especially true as to actual notice of an outstanding title or equity charging a subsequent purchaser. *Greeneaux v. Wheeler*, 6 Tex. 515; *McAnely v. Chapman*, 18 Tex. 198; *Wooster v. Sherwood*, 25 N. Y. 278; *Allen v. McCalla*, 25 Iowa, 464; s. c. 96 Am. Dec. 64.

⁴ *Pepper's Appeal*, 77 Pa. St. 373. See *Wells v. Smith*, 2 Utah, 39, with dissenting opinion by Judge Emerson, citing *Boyd v. Schlosinger*, 59 N. Y. 301; *Cook v. McChristian*, 4 Cal. 23; *Farmer's Bk. v. Bronson*, 14 Mich. 361.

not obtain that the law contemplates the record of every instrument affecting its title. Thus, the Texas statute authorizes (or permits) the record of "any instrument of writing concerning any lands or tenements, or goods or chattels, or movable property of any description;"¹ yet it is not held in that state that the failure to record a bill of sale of personal property will defeat the owner's title as against a subsequent purchaser; nor does this permissive statute give the effect of constructive notice to the record of instruments affecting personal property not otherwise, or elsewhere in the statutes, required to be recorded.² In Georgia the statutes have, from an early period, permitted the record of instruments relating to personalty; but the correct rule of judicial interpretation as to such permissive record is that which is now legislatively declared in the code of that state in this language: "Deeds and bills of sale to personalty may be recorded in the office of the clerk of the Superior Court of the county where the maker resides. Such record being permissive and not compulsory, is not constructive or implied notice to any one; it is otherwise where the law requires the record to be made, and it is properly made."³ The tendency of modern legislation is to extend the law of record to personal property. Many circumstances arise under which a record of its title or transfer, and of liens and claims affecting it, will materially serve the interests of commerce, and the ends of justice as well. These circumstances relate more especially to chattel mortgages and other liens, conditional sales and assignments for the benefit of creditors. The registry statutes relating to personalty are usually, and often materially, different from those pertaining to realty, and for this reason the subject of per-

¹ Rev. Stats. §4331; *Shifflet v. Morelle*, 68 Tex. 382; s. c. 4 S. W. Repr. 843.

² *Chandler v. Burnham*, 15 Tex. 441; *Johnson v. Brown*, 25 Tex. Sup. 126; *Pegram v. Owens*, 64 Tex. 475; and see *Ex parte Fitz*, 2 Lowell, 519; *Shifflet v. Morelle*, 68 Tex. 382.

³ Code of Ga., 1882, §2710.

sonal property presents a distinct branch of the law of record.¹

§41. Chattel Mortgages.

As to chattel mortgages, registration is intended to take the place of the delivery and possession of the property required at common law.² Under nearly all the statutes registration alone, without delivery or change of possession, is sufficient;³ and under perhaps all of them possession alone will suffice;⁴ and defects in the record of a chattel mortgage have been held cured by a subsequent delivery of the property.⁵ The validity of the instrument, or the lien of a chattel mortgage, as between the parties thereto, and as to third parties with actual notice of it, depends upon registration to a larger extent, and under a greater number of statutes, than does the validity and lien of real estate mortgages and deeds. In a number of the states actual notice will not supply the place of registry of a chattel mortgage as against any person;⁶ in others it will suffice as

¹ See *post*, ch. 10. The Virginia statute does not authorize the record of sales or transfers of choses in action. *Gordon v. Rixley*, 76 Va. 694, 701. Under the Tennessee statute recording is, as to personal property, permissive only, yet such record charges constructive notice. *Parker v. Hall*, 2 Head. 641.

² *Russell v. Fillmore*, 15 Vt. 130; *Gass v. Hampton*, 16 Nev. 189; *Jones on Chattel Mortgages*, §176; 2 *Hilliard on Mortgages*, p. 468. and cases there cited; *Bullock v. Williams*, 16 Pick. 33; *Cotton v. Marsh*, 3 Wis. 221.

³ See *post*, §254; *Horton v. Williams*, 21 Minn. 187; *Comp. Stats. of Neb.*, p. 287, §11; *Burley v. Marsh*, 11 Neb. 291; and statutory laws in ch. 11. *post*.

⁴ In some of the states, as Utah and Louisiana, there are no statutory provisions as to chattel mortgages; and possession is, of course, essential to a chattel mortgage in the one, and a pledge in the other. The present Constitution of Louisiana, art. 177, provides that privileges, or liens, on movable property shall exist without registration for the same, except as the legislature may prescribe. *Mullen v. His Creditors*, 39 La. 397; s. c. 2 South. Repr. 45. In other states, as Pennsylvania, California and Nevada, the statutes provide for chattel mortgages on certain kinds of property only. *Tregear v. Etiwanda Co.*, 76 Cal. 537.

⁵ *Morrow v. Reed*, 30 Wis. 81; *Chipron v. Feikert*, 68 Ill. 284; *Brown v. Webb*, 20 Ohio, 389; *Jones on Chattel Mortgages*, §178.

⁶ *Rev. Stats. of Me.*, 1871, ch. 91, §§1, 2; *Sheldon v. Conner*, 48 Me. 584; *Rev. Stats. of Mo.*, 1879, §2503; *Rawlins v. Bean*, 80 Mo. 614; *Rev.*

against subsequent purchasers, but not as against any creditor.¹ Under some statutes, if a chattel mortgage is not recorded within the time limited by statute, the record is not constructive notice for any purpose;² while under others the rule as to deeds prevails, and such record will be good from the time it is made.³ The general rule obtains that these mortgages are good as between the parties without record, or with defective record.⁴ The place of their record is usually where the mortgagor resides; sometimes also the county where the property is situate; and in case of its removal, the mortgage is generally required to be recorded in the county to which the property is removed.⁵

§42. Abstracts of Judgments.

To the end that notice may be more clearly given of judicial proceedings and action thereunder affecting property, many of the statutes make special provision for the recording of certain matters of this kind, some of the more important of which will be here noticed.

Stats. of Wis., 1878, ch. 105, §2313; *Donaldson v. Johnson*, 2 Chand. 160; Rev. Stats. of Ill., 1880, ch. 95, §1; *Dowell v. Stewart*, 83 Ill. 538; Rev. Stats. of Ind., 1876, p. 505, §10; *Kennedy v. Shaw*, 38 Ind. 474; Public Stats. of Mass., 1882, ch. 192; *Bingham v. Jordan*, 1 Allen, 373; s. c. 79 Am. Dec. 750; *Gassner v. Patterson*, 23 Cal. 299; *Wilson v. Miller*, 75 Mo. 41; *Hughes v. Menifee*, 29 Mo. App. 192; *Howard v. Chase*, 104 Mass. 251; *Lockwood v. Slavin*, 26 Ind. 135; *post*, §269.

¹ *Brothers v. Mundell*, 60 Tex. 240; *Keller v. Smalley*, 63 Tex. 519; *People v. Bristol*, 35 Mich. 31; *Braley v. Bymes*, 25 Minn. 297; *Sayre v. Hewes*, 32 N. J. Eq. 652; *Farmer's Loan Co. v. Hendrickson*, 25 Barb. 484. This is the rule in Kansas, Tennessee, Kentucky and some other states. *Post*, §270.

² *Sidener v. Bible*, 43 Ind. 230; *McCord v. Cooper*, 30 Ind. 9; *post*, §255.

³ *Hardaway v. Semmes*, 24 Ga. 305; *Johnson v. Patterson*, 2 Woods, 443.

⁴ *Stewart v. Platt*, 101 U. S. 731; *Badger v. Batavia M. Co.*, 70 Ill. 302; *Johnson v. Jeffries*, 30 Mo. 423; *Jones on Chattel Mortgages*, §237, and cases there cited; *post*, §254.

⁵ *Post*, §§261-264; Rev. Stats. of Texas, §4341, and statutes in Appendix. For cases as to the place of record, where the mortgagors are a firm whose members reside in different counties, see *post*, §264; *Stewart v. Platt*, 101 U. S. 731; *Hubbardson Lumber Co. v. Covert*, 35 Mich. 254; *Morrill v. Sanford*, 49 Me. 566; *Rich v. Roberts*, 48 Me. 548; *Briggs v. Leitelt*, 41 Mich. 79.

Usually judgments do not become liens upon real estate, at least as against subsequent purchasers without notice, until docketed.¹ It would be specially inconvenient to permit judgments of justices of the peace, scattered throughout the county, to operate as liens without being docketed, or enrolled at the county seat, in some record kept there for public inspection.² For reasons of convenience and certainty the statutes in many instances go beyond the ordinary docketing, and provide that before the lien of any judgment shall attach, a certified copy, or an abstract thereof, shall be filed with the recorder of deeds for the county in which the lands to be affected are situated.³ Under the policy of these statutes, such record is usually held essential to the existence of the lien, and its place cannot be supplied by actual notice of the judgment.⁴ Even the indexing is, by some of the statutes, made essentially necessary.⁵ Where the judgment of a lower court was affirmed on appeal, with costs and damages, such costs and damages were held not to constitute a lien until docketed

¹ Freeman on Judgments, §343, citing *Foster v. Chapman*, 4 McCord, 291; *Close v. Close*, 28 N. J. Eq. 472; *contra*, *Renick v. Ludington*, 14 W. Va. 367. The rule would not apply at common law, if the purchaser had actual notice of the judgment; *Davis v. Strathmore*, 16 Ves. 419; *Proctor v. Cooper*, 2 Drew. 1.

² For statutes requiring abstracts of such judgments to be furnished to the county recorder, see Rev. Stats. of Tex. §3156; C. C. P. of Cal. §§897-900; Civil Code of La. §§3322-3, 3329. A judgment of the Circuit Court of the United States is a lien from its rendition over lands of the defendant within the district over which the court has jurisdiction, and the statute of Florida requiring judgments to be recorded in the county where the land lies, has no application to such judgment. *Doyle v. Wade* (Fla.), 1 South. Repr. 576.

³ Rev. Laws of Vt., 1880, §770; Rev. Stats. of Wis. §2236; *Taylor v. Hotchkiss*, 2 La. Ann. 917; Rev. Stats. of Mich. §6650; Civ. Code of Dak. §647; Rev. Stats. of Tex. §§3153-3163; *Chaffe v. Walker*, 39 La. Ann. 35; s. c. 1 South. Repr. 290.

⁴ *Shaw v. Neale*, 6 H. L. Cas. 581; *Pomeroy's Eq. Jur.* §§641-642.

⁵ *Metz v. State Bank*, 7 Neb. 165. Indexing was not essential under the former statutes of Texas; *Schleicher v. Markword*, 61 Tex. 99; but is so now; Rev. Stats. §3159; *Belbaze v. Ratto*, 69 Tex. 636. It is held not necessary to the creation of a docket lien, in Virginia; *Old Dominion Granite Co. v. Clarke*, 28 Gratt. 617.

below.¹ Where the statute required that the docket “particularly state and set forth the names of the parties,” an entry of the firm names of the defendants, without their christian names, was held to create no lien.² Mis-spelling the name will not vitiate, if identity of sound be preserved.³ The general rule of equity jurisprudence that prior equitable interests *in rem*, including unrecorded mortgages and equitable liens upon specific parcels of land, have priority over the general statutory lien of subsequently docketed judgments,⁴ has been much broken in upon by the effect of these statutes of registration as applied to judgments.⁵

§43. Notices of Lis Pendens.

The common law rule requiring purchasers at their peril to take notice of suits in the courts affecting the property, has always been regarded as a harsh one, especially in its application to *bona fide* purchasers for value, and has been tolerated only from a supposed necessity.⁶ In many states the harshness of the rule has been materially modified by statutes providing that the pendency of a suit shall not be notice to a stranger until a notice of *lis pendens* has been filed in the office of the recorder of deeds, or clerk of the county, where the land lies; and that one having no actual

¹ Hunt v. Grant, 19 Wend. 90.

² The York Bank's Appeal, 36 Pa. St. 458; Ridgway & Co.'s Appeal, 15 Pa. St. 177; but see *contra*, Hibberd v. Smith, 50 Cal. 511.

³ Meyer v. Fegaly, 39 Pa. St. 429; Petrie v. Woodworth, 3 Cal. 219; Freeman on Judgments, §347.

⁴ Price v. Cole, 35 Tex. 461; Galway v. Malchow, 7 Neb. 285; Wilcoxon v. Miller, 49 Cal. 193; Wheeler v. Kirtland, 24 N. J. Eq. 552; Apperson v. Burgett, 33 Ark. 328; Greenleaf v. Edes, 2 Minn. 264; Kelly v. Mills, 41 Miss. 267; 2 Pom. Eq. Jur. §§721-724.

⁵ Grace v. Wade, 45 Tex. 522; overruling Price v. Cole, *supra*; Miller v. Estill, 8 Yerg. 452; Smith v. Jordan, 25 Ga. 647; Uhler v. Hutchinson, 23 Pa. St. 110; Barker v. Bell, 37 Ala. 354; Young v. Devries, 31 Gratt. 304; King v. Portis, 77 N. C. 25; Guiteau v. Wisely, 117 Ill. 433. See *post*, ch. 8.

The recording in another county of a judgment which has become dormant because of failure to issue execution within twelve months, is of no effect. Clements v. Ewing, 71 Tex. 370.

⁶ Hayden v. Bucklin, 9 Paige, 572; Leitch v. Wells, 48 N. Y. 585; Richardson v. White, 18 Cal. 102.

notice may acquire a good title until such notice is filed.¹ Constructive notice is made by these statutes to depend upon the filing of the proper statutory notice.² Where the terms of the statutes apply only to real estate, the rule as to suits concerning personal property remains unchanged, and as at common law.³ The general rules and limitations of the doctrine of *lis pendens*, as to the commencement, continuance and termination of the suit, as to the identification of the subject matter, and as to the persons who are affected by it, apply to all cases coming within the statutory provisions.⁴ Actual notice

¹ Code of Va. (1887), §3566; Dawson v. Meade, 71 Iowa, 295; Pub. Stats. of Mass., 1882, ch. 126, §13; Rev. Stats. of Mich. §5765; Gen. Stats. of Minn., 1878, ch. 75, §34; Civ. Code of Proc. of Cal. §409; and statutes of N. Y.; Conn.; Ill.; Iowa; Mo.; Nev.; N. J.; N. C.; Ohio; Or.; Penn.; R. I.; S. C.; W. Va. and Wis. Rev. Stats., §3187.

² Jackson v. Davidson (Mich.), 32 N. W. Repr. 726; Richardson v. White, *supra*; Lecamp v. Carnahan, 26 W. Va. 839; Rosenheim v. Hartsook, 90 Mo. 357; 2 S. W. Repr. 473.

State statutes relating to *lis pendens* apply to suitors only in the state and not the Federal courts. Majors v. Cowell, 51 Cal. 478. Where a mortgage antedated the notice, it was held to have precedence, though not recorded until after the *lis pendens* notice was filed. Hammond v. Paxton, 58 Mich. 393; s. c. 25 N. W. Repr. 321.

The effect of the notice remains unchanged, although the *lis pendens* paper may have been lost from the files, or may have been, through no fault of the party filing it, improperly entered by the clerk. Heine v. Ellis, 49 Mich. 241.

³ Allen v. Atchison, 26 Tex. 616; Leitch v. Wells, 48 N. Y. 585. In some states the statutory notice is confined to certain kinds of personal property, as in Kansas (Dassler's Comp. Laws, p. 612, §81), and in Maine, N. H.; Vt. and Mass.

It is held in North Carolina that the statute (Battle's Rev., ch. xxii, §90), does not apply to real property situate in the county where the suit is pending. Badger v. Daniel, 77 N. C. 251; Rollins v. Henry, 78 N. C. 342; Todd v. Outlaw, 79 N. C. 235. The New York courts, however, place a different construction on a similar statute. Lamont v. Cheshire, 65 N. Y. 30.

⁴ See Brooks v. Davey, 109 N. Y. 495; s. c. 17 N. E. Repr. 412; Briscoe v. Ashbey, 24 Gratt. 471; Cirode v. Buchanan, 22 Gratt. 205; Davis v. Life Ins. Co., 84 Ill. 508; Dresser v. Wood, 15 Kan. 344; Drake v. Crowell, 40 N. J. L. 58; Brown v. Goodwin, 75 N. Y. 409; Roach v. Riverside Co., 74 Cal. 263; White v. Perry, 14 W. Va. 66; Page v. Waring, 76 N. Y. 463; Hall v. Gustin, 51 Mich. 624; s. c. 20 N. W. Repr. 616; Mayberry v. Morris, 62 Ala. 113; Jones v. McNarrin, 68 Me. 334; s. c. 28 Am. Rep. 66; Fuller v. Scribner, 76 N. Y. 190; Tredway v. Mc-

will supply the want of filing the notice required by the statute.¹

§44. Attachment and Execution Liens.

Some of the statutes provide for the recording of certificates of the levy of attachments, executions and other writs creating a lien on real estate.² In those states where there are no statutory provisions for giving notice of *lis pendens*, some provision as to giving notice of the liens cre-

Donald, 51 Iowa, 663; Farmer's Bank v. Fletcher, 44 *Id.* 252; Head v. Fordyce, 17 Cal. 149; McIlwrath v. Hollender, 73 Mo. 105; s. c. 39 Am. Rep. 487; Wade on Notice, §§337-377; Jones on Mortg. §599; 2 Devlin on Deeds, §§803-805; 2 Pom. Eq. Juris. §§632-640.

Notice of *lis pendens* held not affected by the fact that it was filed several days before the commencement of the suit. Houghton v. Mariner, 7 Wis. 244. *Contra*, the notice in such case is of no effect. Walker v. Hill, 22 N. J. Eq. 514; Dawson v. Mead, 71 Wis. 295; s. c. 37 N. W. Repr. 274; Sherman v. Bemis, 58 Wis. 343. See Weeks v. Tomes, 16 Hun. 349.

¹ Wisconsin Cent. Ry. v. Wis. River Land Co., 71 Wis. 94; s. c. 36 N. W. Repr. 837; Sharp v. Lumley, 34 Cal. 611; Baker v. Pierson, 5 Mich. 476; Sampson v. Ohleyer, 22 Cal. 200; Abadie v. Lobero, 36 Cal. 390; 2 Devlin on Deeds, §805.

If the deed is made before, though recorded after, the filing of the *lis pendens*, it will prevail under Dak. Civ. Code of Proc. §101. Bateman v. Backus (Dak.), 34 N. W. Repr. 66, following Lamont v. Cheshire, *supra*.

² Laws of Texas, 1889, p. 80; Rev. Stats. of Conn. 1875, tit. 3, ch. 3, art. 3, §7; Gen. Laws of N. H., 1878, ch. 27, §7; Pub. Stats. of Mass., 1882, ch. 172, §3; Code of Ga. §2709, and statutes of Maine, Vermont, Michigan and Maryland.

Where a copy of an attachment writ was left with the clerk, it was held to impart the notice, although he neglected to record it. Steam Co. v. Sears, 23 Fed. Repr. 313; and also that such failure of the recorder does not defeat the lien. Sykes v. Keating, 118 Mass. 517; Gen. Stats. of Mass., ch. 123, §§52, 56; *contra*, Benjamin v. Davis, 73 Iowa, 715, as to the notice.

Actual knowledge of an attachment lien held sufficient to charge a subsequent purchaser. Leathwhite v. Bennett (N. J.), 11 Atl. Repr. 29.

The Michigan statute providing for the record of attachment liens, held not to give priority because of registry. Columbia Bank v. Jacobs, 10 Mich. 349; s. c. 81 Am. Dec. 792.

Where the levy is not entered on the incumbrance book, it is not good against a subsequent purchaser without notice. Benjamin v. Davis, 73 Iowa, 715; s. c. 36 N. W. Repr. 717; Code of Iowa, §3022; although the fault was in the failure of the clerk to enter the notice of levy. *Id.*

ated by the levy of such writs would seem to be imperatively required; since otherwise, in cases where the writs were sent from another county, there would be nothing whatever of record in the county where the land lay to give notice of the lien.

§45. Mechanics' Liens.

The statutes of nearly every state provide for the filing and recording of mechanics' liens.¹ This lien is the creature of the statute, and does not exist until the statute, including filing and record, has been complied with, unless the terms of the statute in some way recognize its existence independently of such record.² This feature is important as affecting the question of whether actual notice can supply the place of record, or in any way charge the property in the hands of a subsequent purchaser who buys prior to the record of the lien. The fact that the mechanic is at work on the premises has been held in Kentucky not actual notice of his lien to a *bona fide* mortgagee, or purchaser, who buys during the time prescribed for the filing of the lien.³ The lien is subject to any prior lien that has already attached to the property;⁴ but a prior mortgage, unrecorded at the date of

¹ See Stimson's Am. Stat. Law, §§1960-1987.

² *Cameron v. Marshall*, 65 Tex. 11; *Conway v. Crook*, 66 Md. 290; *Spencer v. Barnett*, 35 N. Y. (8 Tiff.), 96; *Greene v. Ely*, 2 Greene (Iowa), 508; *Noll v. Swineford*, 6 Pa. St. 187; *Dore v. Sellers*, 27 Cal. 588; *White Lake Co. v. Russell* (Neb.), 34 N. W. Repr. 104; s. c. 22 Neb. 126; 3 Am. St. Rep. 262; *Shaw v. Allen*, 24 Wis. 564; *Green v. Green*, 16 Ind. 253; s. c. 79 Am. Dec. 428. In *Cameron v. Marshall*, *supra*, the court say: "The lien has no existence without the record;" but in *Trammell v. Mount*, 68 Tex. 211, it is said: "The registration does no more than preserve a lien which exists already." And see *Huck v. Gaylord*, 50 Tex. 582; *Ferguson v. Ashbell*, 53 Tex. 249. The lien must be indexed and docketed. *Appeal of Cessna* (Pa.), 10 Atlantic Repr. 1.

³ *Foushee v. Grigsby*, 12 Bush. 75; *Neeley v. Searight*, 113 Ind. 316; s. c. 15 N. E. Repr. 598; *Gere v. Cushing*, 5 Bush. 304; *Shackelford v. Beck*, 80 Va. 404.

⁴ *Clark v. Butler*, 32 N. J. Eq. 664; *Campbell's Appeal*, 36 Pa. St. 247; *Lyle v. Ducomb*, 5 Binn. 585; *Norris' Appeal*, 30 Pa. St. 122. That

filing the lien, or of the accrual of the mechanic's right thereto, will in most instances, be subordinated to the mechanic's lien.¹ The statutes are so various in their terms and provisions that it is impossible to lay down general rules on this subject, and each decision must be understood as largely controlled by the statute on which it is based. Usually a time is prescribed within which the claim of lien must be filed for record,² and a filing after that time has been held to confer no rights.³ The intent of the statute is held, in a majority of the cases, to be that without record the right to the lien shall cease after the specified time. When filed within the time, the lien is in many instances made to relate back to the date when the work was begun, or performed, or the material furnished, or to the date of the mechanic's contract, as the case may by statute be, and to take precedence over intervening liens and claims.⁴ But, though given preference by statute over a lien or mortgage, it has been held not to prevail over a sale for valuable consideration paid, although the sale be made within the

the lien has not precedence of prior incumbrances is expressly declared in a number of the statutes. Cothran's Rev. Stats of Ill. (1883), ch. 82, §17; Florida Dig. (1881), ch. 143, §6; Code of Ga. (882), §1980; Pub. Stats. of Mass. (1882), ch. 191, §5; Gen. Stats. of S. C. (1882), §2352.

¹ Jones on Mortg., §479a, citing *Davis v. Bilsland*, 18 Wall. 659; *Neilson v. Iowa East. Ry. Co.*, 44 Iowa, 71; *Dunklee v. Crane*, 103 Mass. 470. By a number of the statutes a lien-holder must have had no actual notice of the prior mortgage or incumbrance. *Laws of N. Y.* (1878), p. 379, §84; *Comp. Laws of N. M.*, 1884, §1523; *Hittell's Codes of Cal.* §11186; *Civ. Code of Idaho*, §819.

² In a few states, as Miss., Mich., Maryland and Vermont, no time is specified.

³ *Jenkins v. Nelson*, 11 Mart. 437; *Cameron v. Marshall*, 65 Tex. 7; *Wilson v. Rudd*, 70 Wis. 98; s. c. 35 N. W. Repr. 321. The record held ineffectual where it showed on its face to have been filed too late, although, in fact, it had been filed in time. *Olson v. Heath*, 37 Minn. 298; s. c. 33 N. W. Repr. 791. *Contra*, record after the time is valid. *Nail v. Temple*, 12 Iowa, 276.

⁴ *Trammell v. Mount*, 68 Tex. 211; s. c. 4 S. W. Repr. 377; *Nail v. Temple*, *supra*; *Eq. Life Ins. Co. v. Slye*, 45 Iowa, 615; *Getchell v. Allen*, 34 *Id.* 559.

time prescribed for filing the lien.¹ A mortgagee who advances the consideration at the time the mortgage is taken, is everywhere regarded as a purchaser for value under the recording acts, and no distinction can be made in principle between his rights and those of any other purchaser as against the mechanic's lien.²

§46. Mechanics' Liens—Continued.

The statutory specification of a period of time within which the claim of lien may be filed seems to have received both a narrow and a liberal construction by the courts; the one proceeding largely on the theory that this is intended only to fix a point of time after which such filing will be of no avail.³ The other construction is substantially the same that is given to the privilege of time allowed by some of the statutes for recording deeds and mortgages;⁴ and under this view it is held that when the claim is filed within the prescribed time, it relates back to the date of the contract, or commencement of the work, and takes precedence over intervening incumbrances, and also that when filed after the expiration of the statutory period, it is a valid lien from the date of

¹ *Odum v. Loomis*, 1 Tex. Civ. App. §524; and see *Foushee v. Grigsby*, 12 Bush. 75.

² In *Kansas* (Comp. Laws, 1879, art. 27, c. 80), the mechanic's lien has preference "of all other liens and incumbrances" which may attach to the property subsequent to the commencement of the work or repairs; and "all other liens and incumbrances" have been held to include a conveyance of the property. *Warden v. Sabins*, 36 Kan. 165; s. c. 12 Pac. Repr. 520. The Texas Statute gives the mechanic's lien preference over "any prior lien or incumbrance or mortgage" upon the land, not already existing at the time of the accrual of the mechanic's lien. Rev. Stats., art. 3171, as amended by Act of March 28, 1885. In *Colorado* the lien is superior to all after-acquired liens, and any prior liens of which the mechanic had no notice, actual or constructive. *Tritch v. Norton*, 10 Colo. 337.

³ See cases in note 3 on preceding page. Where the statute provided that the claim of lien must be filed within thirty days after completion of the building, a filing before completion was held premature. *Roylance v. San Luis Hotel*, 74 Cal. 273; s. c. 20 Pac. Repr. 7; *Catlin v. Douglass*, 33 Fed. Repr. 569.

⁴ See *post*, ch. 6.

filing, and entitled to priority over incumbrances subsequent to the date of record.¹ In accordance with the former line of construction, it is held that actual notice will not, as in the case of rights and equities evidenced by deeds and other written instruments, supply the want of registry in charging notice;² and under the latter construction actual notice is held sufficient.³ Except on the ground that record is essentially necessary to the existence of the lien, and is that by which, both in law and equity, the lien is created, it is difficult to perceive why the general principles of the registry laws should not apply equally to the record of mechanics' liens as to those of mortgage liens, just as far as the difference of circumstances and the rules of equity will permit.⁴

Both a strict and a liberal construction will also be found to have been applied by the courts in determin-

¹ The lien is good between the lien claimant and any incumbrancer whose right accrued during the time within which he is protected and preferred under the law. By his *laches* he simply loses a preference or priority over parties whose rights have accrued subsequently to the time within which such statement is required to be filed; and this, because the law, after the expiration of the thirty days, no longer affects them with constructive notice. *Nail v. Temple*, 12 Iowa, 276.

² *Neeley v. Searight*, 113 Ind. 316; s. c. 15 N. E. Repr. 598; *Foushee v. Grigsby*, 12 Bush. 75; *Van Loan v. Heffner*, 30 La. Ann. 1213.

³ *Nail v. Temple*, *supra*.

⁴ The lien exists alone by virtue of the statute; but such statutes are remedial, and are to receive a liberal construction. *White Lake Co. v. Russell*, 22 Neb. 126; s. c. 34 N. W. Repr. 104; 3 Am. St. Rep. 562; and see *Getchell v. Moran*, 124 Mass. 404; *McPhee v. Litchfield*, 145 Mass. 565; s. c. 1 Am. St. Rep. 482; *Gale v. Blaikie*, 129 Mass. 206.

Occasional repairs, made months after the completion of the building, cannot be so added as to bring the claim of lien for the whole work within the statutory time. *Davis v. Alvord*, 94 U. S. 545. But work done from time to time, as ordered by the owner in the ordinary progress of erecting a building, is "continuous of that previously done," within the meaning of the Penn. Act of 1885, and the time for filing may be reckoned accordingly, although there was no contract for the whole work. *Hofer's Appeal*, 116 Pa. St. 360; s. c. 9 Atl. Repr. 441.

Where suit to enforce the lien is begun within the time allowed for filing the claim, such filing is not necessary, nor is the entry of any particulars of the lien in the mechanic's lien book. *Anderson v. Seamans*, 49 Ark. 475; s. c. 5 S. W. Repr. 799.

ing what will constitute a sufficient affidavit and statement of the claim required to be filed;¹ the tendency of the decisions on this point being in favor of holding a substantial compliance with the statute to be sufficient.²

§47. Mechanics' Liens—Continued.

It is held in Maryland that in order to give a mortgage to secure future advances priority over a mechanic's lien, the mortgage must be first recorded.³ That the account and bill of particulars filed embraced other lots than that on which the building was erected, and on which the lien was claimed, held not to vitiate.⁴

¹ See *Odd Fellows v. Masser*, 24 Pa. St. 507; s. c. 64 Am. Dec. 675. Signing the affidavit held necessary in Maine, although the name be at the top of the account. *Stratton v. Shoenbar* (Me.), 10 Atl. Repr. 446. Not necessary in Oregon, and literal compliance with the statute not required. *Ainslie v. Kohn*, 16 Or. 363; s. c. 19 Pac. Repr. 97; *Whittier v. Blakeley*, 13 Or. 546; *Kezartee v. Marks*, 15 Or. 529; s. c. 16 Pac. Repr. 407. In Kansas the affidavit must be signed. *Hentig v. Perry*, 17 Pac. Repr. 42; but not the statement of claim also; *Deatherage v. Woods*, 37 Kan. 59; s. c. 14 Pac. Repr. 474. It may be made by one member for a firm. *Id.* And may be made before the attorney for the claimant. *McDonald v. Willis*, 143 Mass. 452; s. c. 9 N. E. Repr. 835. And omission of the officer to append his *jurat* held not to vitiate. *Jackman v. Gloucester*, 143 Mass. 380. For other cases, see *Lindley v. Cross*, 31 Ind. 106; s. c. 99 Am. Dec. 610; *Kennedy v. House*, 41 Pa. St. 39; s. c. 80 Am. Dec. 594; *Brennan v. Swasey*, 16 Cal. 140; s. c. 76 Am. Dec. 507.

² A strict technical averment of ownership of the property not exacted. *Hays v. Mercer*, 22 Neb. 656; s. c. 35 N. W. Repr. 894; but upheld though the affidavit is, on this point, "to the best of affiant's knowledge and belief," and the ownership is wrongly stated. *McPhee v. Broderick*, 145 Mass. 565; s. c. 14 N. E. Repr. 923; but see *Morrison v. Phillips*, 35 Minn. 192.

Omission to state credits in the account, as required by the statute, held immaterial. *McCormack v. Phillips* (Dak.), 34 N. W. Repr. 39; *Whittier v. Blakeley*, 13 Or. 546; s. c. 11 Pac. Repr. 305.

A reasonably certain description of the property is sufficient. *White v. Stanton*, 111 Ind. 540; s. c. 13 N. E. Repr. 48; *Smith v. Sarver* (Pa.), 7 Atl. Repr. 99; and is not void because including more land than is subject to the lien, if no fraudulent intent. *White Lake Co. v. Russell*, *supra*; 34 N. W. Repr. 104. A liberal construction to be applied. *Merriam v. Bartlett*, 34 Minn. 524; s. c. 26 N. W. Repr. 728.

³ *Brooks v. Lester*, 36 Md. 65.

⁴ *Lyon v. Logan*, 68 Tex. 521.

Such misdescriptions are immaterial.¹ A description that would be adequate in a conveyance, or that can be rendered certain by the references, is sufficient.² But a claim of lien on one of two lots, is void for uncertainty;³ and so, where the account and the bill of particulars materially vary in the description.⁴ It is immaterial that the lien was recorded in a book kept for the record of bills of sale, provided all such liens were recorded in that book;⁵ and where the statute required only that liens should be recorded in books kept separate from those for the record of deeds and other conveyances, it did not vitiate the record of the mechanic's lien that it was made in the mortgage book.⁶ The certificate of the recorder is sufficient *prima facie* proof of the filing and recording of the account and accompanying affidavit.⁷ Where, after the lien is filed, a note was taken for the amount due, which note reserved a lien, but was not recorded, it was held that the lien of record was not waived or affected.⁸ A bond by the mechanic, conditioned to do the work properly, and accepted by the other party, will answer for the written contract required to be recorded.⁹ Where the contract is verbal, a failure

¹ Edwards v. Derrickson, 4 Dutch. 39; Shattuck v. Beardsley, 46 Conn. 386; Oster v. Robeneau, 46 Mo. 595; White Lake Co. v. Russell, 22 Neb. 126; s. c. 3 Am. St. Rep. 262.

² Swope v. Stantzenberger, 59 Tex. 387; Stuart v. Broome, *Id.* 446; Gillespie v. Remington, 66 Tex. 109; Phillips on Mechanics' Liens, 379; Whitemark v. Noe, 3 Stark's Ch. 321; Merriman v. Bartlett, 34 Minn. 524; s. c. 26 N. W. Repr. 728.

³ Lyon v. Logan, 66 Tex. 57.

⁴ Adams v. Cook, 55 Tex. 161.

⁵ Lyon v. Logan, 68 Tex. 521.

⁶ Quinn v. Logan, 67 Tex. 601; s. c. 4 S. W. Repr. 247; Billings v. Martin (Me.), 10 Atl. Repr. 445.

⁷ Stuart v. Broome, 59 Tex. 466.

⁸ Pope v. Graham, 44 Tex. 196; Phillips on Mechanics' Liens, 276; Grant v. Strong, 18 Wall. 623. Nor is it affected by a removal of the indexed statement from the files of office. Bell v. Teague (Ala.), 3 South. Repr. 861.

⁹ Martin v. Roberts, 57 Tex. 564.

to record the bill of particulars is fatal to the lien.¹ The contract required to be recorded is the one by virtue of which the work was done or material furnished, and not any subsequent contract relating to the matter.²

§48. Miscellaneous Instruments.

Under New York Rev. Stats., §137, p. 738, declaring that grants in fee of freehold estates shall not take effect as against purchasers and incumbrancers unless acknowledged or attested, it has been held that a servitude was not an estate in lands within the meaning of that act.³ This, however, is not the general rule; the decision in that case proceeding upon the terms of the act under construction. Where a grantor conveyed land by deed in which no mention was made of a right-of-way that had been reserved by verbal agreement with the grantee, it was held that a purchaser from the grantee, for valuable consideration and without actual notice of such reservation, took the land freed from the easement, because notice of the same had not been given by some conveyance thereof duly recorded.⁴ So, the grant of a private right-of-way to an adjoining landowner, is within the registry laws.⁵ A certificate of division of partnership property, including lands, was held recordable as an instrument concerning lands;⁶ and a written acknowledgment by the grantee of a land certificate already located, that he had previously sold and conveyed it, is an

¹ Lyon v. Ozee, 66 Tex. 95.

² Reese v. Corlew, 60 Tex. 70; Taylor v. Huck, 65 Tex. 238; Lee v. Phelps, 54 Tex. 368; Lyon v. Ozee, *supra*. But see Mundin v. Berwin, 62 Tex. 341.

³ Nellis v. Munson, 24 Hun. 575; Nellis v. Munson, 108 N. Y. 453; Snell v. Levitt, 110 N. Y. 595. For case holding that under this act a subsequent purchaser acquired the title although he bought with actual notice of a prior conveyance, and was not a purchaser for valuable consideration, see Chamberlain v. Spargur, 86 N. Y. 603; s. c. 22 Hun. 437.

⁴ Bush v. Golden, 17 Conn. 594.

⁵ Prescott v. Beyer, 34 Minn. 493; s. c. 26 N. W. Repr. 732; Worley v. State, 7 Lea, 382.

⁶ Pegram v. Owens, 64 Tex. 475.

instrument relating to lands and proper to be recorded.¹ In some states debtors are allowed a time for the redemption of lands sold at tax sales, and also those sold under execution and other judicial process, and deeds do not issue immediately upon such sales, but a certificate of sale is issued to the purchaser. A duplicate of this certificate is recorded in the registry of deeds, and the certificate, duplicate or record of same, is by law made evidence of the facts therein stated.² Such certificates may be assigned, but it has been held that the assignee takes subject to every equity, and cannot be regarded as an innocent purchaser, entitled to protection as such, until he is clothed with a legal title by the sheriff's deed.³ The statutes of Colorado expressly requiring that the word "Homestead" should be entered of record on the margin of the recorded title of the homestead before the benefit of the statute can be had, it was held that no room was left for construction, and that actual notice could not be deemed an equivalent, as against a creditor seeking to recover or subject the homestead.⁴

§49. Plats.

The statutes usually provide for recording plats of towns and cities, and sometimes also, plats of subdivisions of lands

¹ *Peterson v. Lowry*, 48 Tex. 408. A parol partition is not affected by the registry laws, and a subsequent levy upon lands other than those allotted to the defendant, is of no effect. *Aycock v. Kimbrough*, 71 Tex. 330.

² Rev. Code of Iowa (1873), §3101; Gen. Stats. of Minn., ch. 8, §190; *Vaughn v. Ely*, 4 Barb. 156; *Everston v. Sawyer*, 2 Wend. 507; *Gossard v. Ferguson*, 54 Ind. 519; *Gardner v. Eberheart*, 82 Ill. 316; *Lasell v. Powell*, 7 Coldw. 277; *Evans v. Ashley*, 8 Mo. 177.

³ *Warvelle on Abstracts*, 436; citing *Roberts v. McClelland*, 82 Ill. 538; *Reynolds v. Harris*, 14 Cal. 667; *Messerschmidt v. Baker*, 22 Minn. 81; *Potts v. Davenport*, 79 Ill. 455; *Swink v. Thompson*, 31 Mo. 336.

In Texas purchase money notes given for land are entitled to record if acknowledged. *Saunders v. Hartwell*, 61 Tex. 680.

⁴ *Goodwin v. Col. M. Inv. Co.*, 110 U. S. 1. The constitutions of Nevada and Louisiana provide that laws shall be enacted requiring homesteads to be recorded, and legislation on this subject can be found in nearly all the statutes. A provision authorizing the record of a designation of the homestead (Rev. Stats. of Tex. §2344; Rev. Code of Iowa, §1999). is usually only a matter of privilege and convenience, designed to give notice to creditors, and to save the expense of a designation by order of court, which might otherwise become necessary.

generally.¹ These plats are ordinarily recorded along with the registry of deeds, and the requirements of the statute in relation to them, are usually indispensably requisite to a valid registration. When duly executed, acknowledged and recorded, certified copies thereof may be used in evidence to the same extent, and with like effect, as in cases of deeds.² The record of such plat is in effect a dedication of the streets and alleys marked thereon to public use;³ and by some of the statutes such record is further made to operate as a conveyance of all the portions marked on the plat to the public, or to any society, corporation or body politic.⁴ Aside from the statute, the reservation to public use of portions of the premises shown on a plat by which sale is made, will create a servitude by estoppel in favor of purchasers of adjoining lots.⁵ The fee, however, will at com-

¹ Rev. Code of Iowa (1873), §559; Rev. Stats. of Wis. (1878), p. 645; Rev. Stats of Ill. (1874), p. 771; *Satchell v. Doram*, 4 O. St. 542. Record of a town plat not necessary to its validity, where the statute in reference to it is only directory. *Commissioners v. Wood*, 10 Pa. St. 93; s. c. 49 Am. Dec. 582.

² *Warvelle on Abstracts*, 147. A map pasted between the leaves of the record book, or recorded in pencil, is not duly recorded. *Caldwell v. Center*, 30 Cal. 539; s. c. 89 Am. Dec. 131.

³ *Bissell v. N. Y. Cent. Ry. Co.*, 23 N. Y. 61; s. c. 26 Barb. 63; *Rees v. Chicago*, 38 Ill. 322; *Irwin v. Dixon*, 9 How. 30; *Godfrey v. City of Alton*, 12 Ill. 292; *Dillon on Municipal Corp.* §498; *Price v. Meth. Church*, 4 O. St. 515, 542; *Mauderschild v. Dubuque*, 29 Iowa, 73; *Banks v. Ogden*, 2 Wall. 57.

⁴ *Lebanon v. Warren Co.*, 9 Ohio, 80; and see statutes cited in first note to this section; *Brown v. Manning*, 6 Ohio, 298; *Lake View v. LeBahn*, 120 Ill. 92.

⁵ *Harrison v. Boring*, 44 Tex. 256; *Bissell v. N. Y. Ry. Co.*, *supra*; *Lake View v. LeBahn*, 120 Ill. 92; *In re Pearl Street*, 111 Pa. St. 565; *Point Pleasant v. Cranmer*, 40 N. J. Eq. 81; *In re Brooklyn Street*, 118 Pa. St. 640; s. c. 4 Am. St. Rep. 618; *Maywood v. Maywood*, 118 Ill. 61; *Banks v. Ogden*, 69 U. S. (2 Wall.), 57; *New Orleans v. U. S. 10 Pet.* (35 U. S.), 498; *Smith v. Portland*, 30 Fed. Repr. 734; *Shellhouse v. State*, 110 Ind. 509; *Lockland v. Smiley*, 23 O. St. 94; *Ragan v. McCoy*, 29 Mo. 356; *Bartlett v. Bangor*, 67 Me. 460; *Commonwealth v. Moorehead*, 118 Pa. St. 344; s. c. 4 Am. St. Rep. 599; *Weeping Water v. Reed*, 21 Neb. 261; s. c. 31 N. W. Repr. 797; *Morgan v. Chicago*, 96 U. S. 716; *Abbott v. Cottage City*, 143 Mass. 521; *Trerice v. Barteau*, 54 Wis. 99; *San Leandro v. LeBreton*, 72 Cal. 170; *Oswald v. Grenet*, 22 Tex. 94; *Lamar Co. v. Clements*, 49 Tex. 354.

mon law remain in the original proprietor, burdened with the servitude; but the effect of the statutes is usually to pass the fee to the municipality or other body.¹ If a deed gives no other description of the land than the lot or block of a survey or subdivision, the authentic plat of such survey is as much a part of the deed as if set out in it; and a reference to a plat is as effective by way of estoppel as express words of grant or covenant.² A reference to a plat by lot and block has been held entitled to a more controlling influence than a special description by metes and bounds, which followed the reference and limited the area to less than the lot referred to in the plat.³ Where a private plat is referred to, but not recorded with the deed, it is not notice.⁴

The rule of estoppel, however, is often denied as against married women. *McBeth v. Trabue*, 69 Mo. 642, 657; *Todd v. Pittsburg*, 19 O. St. 514; *Bradstreet v. Pratt*, 17 Wend. 44.

¹ *Manly v. Gibson*, 13 Ill. 308; *Ry. Co. v. Joliet*, 79 Ill. 25; *Gridly v. Hopkins*, 84 Ill. 528.

² *Dolde v. Vodicka*, 49 Mo. 100; *Powers v. Jackson*, 50 Cal. 429.

³ *Rutherford v. Tracy*, 48 Mo. 325; *Warvelle on Abstracts*, 145. Where the number of the block was wrongly given, but there were other descriptive recitals in the deed which, if followed up, would show the error, such error was held immaterial. *Briggs v. Ripley* (Minn.), 3 N. W. Repr. 120; and see *Subert v. Rosser*, 24 Minn. 155; *Schweiss v. Woodruff* (Mich.), 41 N. W. Repr. 511.

"If the description in the deeds was sufficiently certain, by a reference to the plat on record, to identify and locate the lots, the title passed to the grantees, whether the plat conformed to the acts of the legislature or not. This is all that is material so far as the plat is concerned"—both parties claiming under the same survey of the town (Chicago), and by reference to the same plat. The original plat had been introduced in evidence below, to prove that the plat as recorded did not correctly show the lines. This was held error, as the deeds of both parties referred to the recorded plat. The remedy for an error of description was in chancery to reform the deed, while this was an action of ejectment. *Jones v. Johnston*, 18 How. 150.

⁴ *Shirras v. Craig*, 3 Cranch, 34.

In Texas there is no statutory provision as to recording plats, but if duly acknowledged, it is believed that they are admissible to record under article 4331 of the Revised Statutes (1879), as "instruments of writing concerning lands and tenements;" and a reference in a deed to a plat or map, whether recorded or not, is a good descriptive call, on the principle that "that is certain which can be made certain." See *Oswald v. Grenet*, 22 Tex. 94.

§50. Record of Wills.

By reference to the statute of 7 Anne, ch. 20, quoted in the first section of this work, it will be seen that wills are included with other conveyances of real estate in that act. By the registry act for the East Riding of Yorkshire, it is provided that where there is an impediment to the registration of the will within the time prescribed, the registration of a memorial of such impediment will preserve the rights of devisees as though the will itself had been registered, until such time as the impediment is removed.¹ And by 37 and 38 Vict, ch. 78, for Middelsex and Yorkshire, it is provided that where a will has not been registered within the time allowed, a conveyance by the devisee shall take precedence, if first registered, over one from the testator's heir-at-law. A will by which lands are devised, though differing from a deed in its manner of probate and in other features, is yet a written conveyance of real estate, and it is consistent with the policy and harmony of the system of registration that wills should be placed, as by these English statutes, within the registry acts. While in a number of the American states, wills are required to be recorded with other conveyances,² in a great majority of

In Iowa, where there is a statutory provision for recording plats, the court said: "Without such recorded plat there was one link wanting in plaintiff's recorded chain of title. The only means of supplying this defect in their record title was to take possession of the property, or otherwise bring actual or constructive notice of the missing link to the defendant." *Stewart v. Huff*, 19 Iowa, 557. See as to plats, *Deery v. Cray*, 10 Wall. 263, 272.

¹ Under this statute it was held that a devisee loses his priority as against a subsequent registered mortgagee for value, unless he registers a memorial of the will, or of the impediment which prevents its registration, within six months of the decease of the deviser, even although he is ignorant of the existence of the will until after the expiration of the six months—a failure to discover the will being such impediment as was contemplated by the act. *Chadwick v. Turner*, 11 Jur. N. S. 333; 34 Beav. 634. See *Wyatt v. Barwell*, 19 Ves. 435; *Hall's Lessee v. Ashby*, 9 Ohio, 96.

² Rev. Stats. of Wisconsin (1878), §2296; *Hurd's Rev. Stats. of Ill.* ch. 30, §33; *Gen. Stats of Minn.*, ch. 47, §35; *Gen. Stats. of Colo.*

them legislation and decision, as to the record of wills, seem to have proceeded on the theory that their registration is not needed under, nor contemplated by, the recording acts, and that their record in the court where probated, is sufficient notice of their existence and contents. The probate of a will is in the nature of a proceeding *in rem* such as is held to charge every one with notice thereof.¹

§51. Record of Wills—Continued.

When the lands devised by will lie in the county where the will is probated, the American theory and practice is not open to very serious objection; although, even in such case, it would be well to require a record of the will along with that of other conveyances, in order that the chain of title might be made to fully appear in the office where title is recorded. But where the will conveys lands situated in other and perhaps distant counties, a failure to require the will to be recorded in such other counties, leaves a *hiatus* in the record title of such lands, existing under circumstances that offer full opportunity for the frauds and evils that registration is designed to prevent. Some of the statutory provisions authorizing the recording of a certified copy of a will, not being mandatory in terms, nor found in the recording acts proper, are only permissive in their nature, and do

(1883), §230; Rev. Stats. of Maine (1883), ch. 7, §16; and see statutes of New York, Vermont, Nebraska, California, Idaho, Michigan and Arizona. In Alabama, wills creating estates in remainder or reversion, are void as against creditors of the tenants for life, in possession, unless recorded within five years. Rev. Code, §1560.

¹ Hall v. Hall, 47 Ala. 290; Lalanne v. Moreau, 13 La. 431; Hodges v. Bauchman, 8 Yerg. 186; Scott v. Calvit, 3 How. (Miss.), 158; State v. McGlynn, 20 Cal. 271; 3 Redmon on Wills, 63; Steele v. Renn, 50 Tex. 468, 481; Orr v. O'Brien, 55 Tex. 149; Freeman on Judgments, §608; and see Wharton's Confl. of Laws, §645; Story's Confl. of Laws, §474; Kerr v. Moore, 9 Wheat. 565; Leitch v. Wells, 48 N. Y. 585; Jackson v. Warren, 32 Ill. 331; Grignon's Lessee v. Astor, 2 How. 319; McPherson v. Cunliff, 11 Serg. & R. 422.

As to the application to wills, in England, of the doctrine of tacking, see O'Hara on Wills, 185. As to when a registered will is not notice, see Woods v. Farmere, 7 Watts, 382.

not fully remedy the evil.¹ In reference to the application of the *lex loci rei sitæ* to wills executed in another state or county, and as to the recognition accorded to foreign probates, the statutes of the various states are even more discordant and conflicting than in relation to the acknowledgment and proof of deeds.² By a recent statute of Texas, where a will conveying lands in that state has been probated in another state, a certified copy of such will and its probate may be recorded by the register of deeds in the county where the land lies, without further proof or authentication.³ This is, perhaps, the law in a few other states; and such a provision, it may be presumed, will ultimately become general, and be made as mandatory as any other record of title, whether the will has been probated in another state, or in a county, within the state, other than where the land lies.

A purchaser from a devisee under a duly probated will is not affected by a subsequent setting aside of the will;⁴ and the rule extends also to a purchaser under a sale by order

¹ Rev. Stats. of Texas (1879), §4876.

² By the laws of Rhode Island (Pub. Stats., ch. 183, §10), and of sixteen other states, no will executed out of the state is valid, unless executed according to the laws of the home state. In Oregon and Missouri, an exception is made in favor of wills conveying personalty. In Maine (Rev. Stats., ch. 64, §12), and thirteen other states, a will made out of the state but within the United States is valid, and will pass property in the state, if valid by the law of the state or territory where it is made; and in several states this is the case where the will is executed in a foreign country. In Iowa (Rev. Code, 1873, §2351), and eighteen other states, the probate of a will in another state will be recognized, usually with little other requirement than that a copy of the will and certificate of its probate be filed in the proper court.

³ Laws of 1887, p. 38; Sayles' Tex. Civ. Stats., §548a. The probate of a will in one state is not notice in another state where the lands devised are situate, and an innocent purchaser of the lands will be protected against the will where he purchases from the heirs in whom the apparent title is vested under the rules of descent. *Staton v. Singleton* (Tex.), 9 S. W. Repr. 876.

⁴ *Fowlke v. Zimmerman*, 14 Wall. (81 U. S.), 113; *Davis v. Gaines*, 104 U. S. 386; *Grignon's Lessee v. Astor*, 2 How. (43 U. S.), 319; *Waters v. Stickney*, 12 Allen, 15; *Knoblock v. Mueller*, 17 N. E. Rep. (Ill.), 696; *Williams on Executors* (6 Am. ed.), 590 and notes; *Steele v. Renn*, 50 Tex. 468.

of a probate court.¹ But if such purchaser knew, or had good reason to believe, there was a later will, he is chargeable with actual notice, and is not protected.² A will has been held not to prevail against an unrecorded deed, and the record (probate) of the will by one named therein as executor not to militate against his superior right to land of which he was in possession by virtue of an unrecorded contract with the testator.³

¹ Davis v. Gaines, *supra*; Allen v. Dundas, 3 T. R. 125; Lalanne v. Moreau, 13 La. Ann. 431; McNutt v. Turner, 16 Wall. 352; Ballow v. Hudson, 13 Gratt. 672; Steele v. Renn, 50 Tex. 468.

² Myra Clark Gaines v. De LaCroix, 6 Wall. (73 U. S.), 719, in which Judge Davis makes a very pointed application of the rule.

³ Woods v. Farmere, 7 Watts, 382; s. c. 32 Am. Dec. 772; Martin v. Jackson, 27 Pa. St. 509. In Hall's Lessee v. Ashby, 9 Ohio. 96; s. c. 34 Am. Dec. 424, Grimke, J., says it is impracticable to establish a registry of wills similar to that of deeds, because the will is not committed to the devisee, but to the executor; and because it is impossible to fix an express period for registry in consequence of the absence, legal incapacity or future interest of the devisee—hence it was held in that case that the law did not require the registry of a foreign will. Where a will is probated within the state, a *bona fide* purchaser from the devisee will be protected against an unrecorded deed made by the testator in his lifetime. Lyon v. Gleason (Minn.), 42 N. W. Repr. 286.

CHAPTER 3.

ACKNOWLEDGMENT.

- §52. Purpose of the acknowledgment.
- 53. Where acknowledgment not required.
- 54. For what not necessary.
- 55. Acknowledgment necessary to the record.
- 56. As proof of execution.
- 57. By whom to be made.
- 58. By one of several grantors.
- 59. By agents and trustees.
- 60. On behalf of corporations.
- 61. Before whom to be made.
- 62. Deputies, magistrates, etc.
- 63. *Ex-officio* officers.
- 64. *De-facto* officers.
- 65. Local jurisdiction of the officer.
- 66. Presumptions as to jurisdiction and authority.
- 67. Disqualification of officer by interest.
- 68. Disqualification by relationship.
- 69. The certificate of acknowledgment.
- 70. Caption and locality.
- 71. Official capacity must appear.
- 72. Initial letters and abbreviations.
- 73. Using official seal.
- 74. Seal to be shown how.
- 75. Certificates of magistracy and conformity.
- 76. Identity of grantor.
- 77. The words of identity.
- 78. Stating grantor's name.
- 79. Substantial compliance sufficient.
- 80. Equivalent expressions.
- 81. Omission of material words.
- 82. Clerical omissions and mistakes.
- 83. Surplusage.
- 84. Dating the certificate.
- 85. Signature of the officer.
- 86. Certificate on same sheet with deed.
- 87. When and of what certificate is conclusive.
- 88. How far certificate is conclusive.

89. Certificate impeachable for fraud.
90. Evidence necessary to overcome the certificate.
91. Amendment of the certificate.
92. Continued.
93. Continued—Married women.
94. Correction by the courts.
95. Acknowledgment of ancient deeds.
96. *Testimonios* and public acts of sale.
97. Validating statutes.

§52. Purpose of the Acknowledgment.

Acknowledgment or proof of a deed or other instrument authorized by law to be recorded, made before some designated officer and duly certified, has hitherto been almost universally required by the statutes as a prerequisite to valid registration.¹ The object of the acknowledgment, it has been said, is to insure the authenticity of the instrument and to prevent one person from personating another.² It would seem that this object is sufficiently attained by the statute of Georgia, in requiring that the execution of the deed be attested by two witnesses, one of whom shall be an officer; and such attestation, without any certificate of the officer, is all that is required, whether the deed be that of husband or wife.³ In Kansas it is sufficient that the officer certify that the grantor in the deed, being known to him as such, appeared before him "and duly acknowledged the

¹ *Hitz v. Jenks*, 123 U. S. 298; s. c. 8 Sup. Ct. Repr. 143; *Stevens v. Hampton*, 46 Mo. 404; *Schultz v. Moore*, 1 McLean, 520; *Barney v. Sutton*, 2 Watts, 31; *Hastings v. Vaughan*, 5 Cal. 315; *Johns v. Scott*, 5 Md. 81; *Taylor v. Harrison*, 47 Tex. 454; s. c. 26 Am. Rep. 304; *Work v. Harper*, 24 Miss. 517; *White v. Denman*, 1 O. St. 110.

² *McConnell v. Reed*, 2 Scam. 371; *Livingston v. Kettelle*, 1 Gilm. 116; s. c. 41 Am. Dec. 166. An acknowledgment estops the grantor from saying his signature was forged. *Chivington v. Colo. Co.*, 9 Colo. 597; s. c. 14 Pac. Repr. 212.

³ Code of Ga. (1882), §2707; *Dinkins v. Moore*, 17 Ga. 64; and see *ante*, §8, note.

Acknowledgment is not necessary in Louisiana and Alabama, except where recording is invoked to supply proof of the execution of the instrument. The record imparts notice without it. *Stallcup v. Pyron*, 33 La. Ann. 1249; *Dyke v. Dyer*, 14 *Id.* 701; *Fairthorn v. Davis*, 28 *Id.* 728; *Allen v. Whetstone*, 35 *Id.* 850; Code of La. §2253; *Tranum v. Wilkinson*, 81 Ala. 408.

execution of the same.”¹ Usually the statutes require much more than this, and because of errors and omissions in taking the acknowledgment and in writing down in the certificate all that is required, these provisions serve in a very large proportion of cases to defeat the record entirely. In a few instances the statutory forms have been cumbered with matter so entirely immaterial that its omission has been disregarded by the courts; as in Alabama, where the prescribed form of certificate requires the statement that the deed was executed “on the day the same bears date;”² and in Texas, where the certificate is required to state that the grantor executed the deed “for the purposes and consideration therein expressed.”³

¹ Dassler's Comp. Laws of Kan. §1034.

² *Bradford v. Dawson*, 2 Ala. 203; *Hobson v. Kissam*, 8 Ala. 357; *Carter v. Chandron*, 21 Ala. 72.

In Mississippi the certificate must show the grantor's acknowledgment that he “delivered” the instrument. *Buntyn v. Shippers' Co.*, 63 Miss. 94; which subsequent matter, though already acknowledged, may or may not occur. In Florida it is held that proof of the “execution” of an instrument by a witness, includes proof of its delivery. *Ed-ward v. Thom.* 5 South. Repr. 707.

³ Rev. Stats. of Tex. §4313; *Monroe v. Arledge*. 23 Tex. 478. In this case the court says: “The deed itself must import a consideration, if none be expressed; and if one be expressed, it is not material that the one expressed be the one upon which it was actually made. This then, is a formal part of the certificate, which, for the sake of regularity, should be inserted, but its omission does not invalidate the certificate.” But the Arkansas court attaches some consequence to these words on the supposition that “they must have been intended to serve some proper purpose or they would not have been placed there.” *Griesler v. McKennon*, 44 Ark. 517; *Clapp v. Halliday*, 48 Ark. 259; *Little v. Dodge*, 32 Ark. 453; *Jacoway v. Gault*, 20 Ark. 190; s. c. 73 Am. Dec. 494; and see, also, *Currie v. Kerr*, 11 Lea (Tenn.), 138.

A statute of California provided for the recording of sheriffs' certificates of sale, but said nothing about their acknowledgment, and it was held that acknowledgment was not necessary. “Doubtless it would be within the power of the law makers,” said Searle, J., “to provide that all instruments should be recorded so as to impart notice without the formality of proof or acknowledgment.” *Foorman v. Wallace*, 75 Cal. 552, 557; s. c. 17 Pac. Repr. 680; and for a similar decision requiring no acknowledgment for the record of assignments of mortgages, see *Honore v. Wilshire*, 109 Ill. 103, 107.

§53. Where Acknowledgment Not Required.

Within a few years past the statutory requirements as to acknowledgment have, in a number of states, been much simplified, and in several states they have been dispensed with entirely, so far as notice by recording is concerned; and registration has been authorized without any acknowledgment or proof whatever.¹ This is more especially true of the western states and territories whose codes and systems of laws have been but recently formulated and arranged. In South Carolina the statutes have never provided for acknowledgment, but only for proof by subscribing witnesses.² The proper acknowledgment of a deed is a statement by the grantor that he signed or executed it; and the various other matters found in the prescribed forms of certificate (except as relating to married women) as a rule serve no useful purpose, and could in many instances be rejected as mere surplusage.³ There is no presumption of law that a man's act in signing a written instrument is involuntary, and it should be presumed to be his "free and voluntary act," even though this be not stated in the certificate; just as it will be presumed that he executed it for the "uses and purposes therein mentioned and expressed," and not for some other supposable purpose.⁴

¹ Rev. Stats. of Conn. (1875), tit. 18, ch. 6, art. 1, §3; Code of Ala. (1876), §2153; *Tranum v. Wilkinson*, 81 Ala. 408; Gen. Stats. of Colorado (1883), §217; Code of Wash. Ter. (1881), §2323; Rev. Stats. of Ill. (Hurd, 1883), ch. 30, §31; *Morrison v. Brown*, 83 Ill. 562; *Reed v. Kemp*, 16 Ill. 445; *Stebbins v. Duncan*, 108 U. S. 32; *Stallcup v. Pyron*, 33 La. Ann. 1249; *Holladay v. Daily*, 1 Colo. 460; *Brown v. Simpson*, 4 Kan. 76; *ante*, §8.

² Gen. Stats. (1882), §§1775-1777.

³ In the various states, almost without exception, any deed may be authenticated for record on proof by a subscribing witness, and it is usually sufficient for the witness to state that he saw the grantor subscribe the instrument. See *post*, ch. 5. The genuineness of the signature is the fact to be established, whether by acknowledgment or proof. So, this is sufficient in the proof of the execution of the instrument at common law; that it was executed unwillingly, or under duress, or without consideration, being matters of defense.

⁴ In *Webb v. Huff*, 61 Tex. 677, the notary had omitted the words, "Given under my hand and seal," found in the statutory form; and it is

§54. For What Acknowledgment Not Necessary.

As a general rule acknowledgment is not necessary to the validity and sufficiency of a deed or other written instrument, as between the parties to it; an unacknowledged deed being usually held to pass title equally with one duly acknowledged and certified.¹ Exceptions to this rule exist in a few instances where registration is held essential to the validity and operation of a deed or mortgage even as between the parties to it;² and also as to certain classes of instruments, such as sheriffs' deeds, which by the terms of some of the statutes are not complete and operative until acknowledged.³ The exception applies also to deeds by

said in the opinion that while "these venerable words ought, no doubt, to be used by all notaries, yet their presence or absence does not affect the instrument, as it adds nothing to the officer's seal and signature for him to say 'this is my seal and this my signature,' or to use any equivalent words."

Where the certificate did not state that the grantor executed the instrument "freely and voluntarily," the court said that the voluntary execution of the instrument must be presumed, from the fact that he acknowledged that he "executed the same." *Henderson v. Grewell*, 8 Cal. 581.

¹ *Morse v. Beale*, 68 Iowa, 463; s. c. 27 N. W. Repr. 461; *Stephens v. Williams*, 46 Iowa, 540; *Williams v. Jones*, 95 N. C. 504; *Manaudas v. Mann*, 14 Or. 450; *Webb v. Chisholm*, 24 S. C. 487; *Klein v. Richardson*, 64 Miss. 41; *Leinenkugel v. Kehl* (Wis.), 40 N. W. Repr. 683; *Brown v. Phil. Bank*, 6 Serg. & R. 484; *Hill v. Samuel*, 21 Miss. 307; *Jackson v. Allen*, 30 Ark. 110; *Stewart v. Matthews*, 19 Fla. 752; *Harrison v. McWhirter*, 12 Neb. 152; s. c. 10 N. W. Repr. 545; *Wark v. Willard*, 22 N. H. 468; *Raines v. Walker*, 77 Va. 92; *Ricks v. Reed*, 19 Cal. 551; *Fletcher v. Ellison*, 1 Tex. Un. Cas. 661; *post*, §189.

In New York, under 1 Rev. Stats. §137, art. 4, an unacknowledged and unattested deed, purporting to convey a freehold estate, although delivered, is absolutely void, and actual notice of its existence cannot affect a subsequent purchaser from the grantor. *Chamberlain v. Spargur*, 86 N. Y. 603. So, in Alabama, a deed without acknowledgment, and also without subscribing witnesses, is ineffectual as a transfer of land. Code of Ala. §§2145, 2146; *Hendon v. White*, 52 Ala. 597; *Lord v. Folmar*, 57 Ala. 615; *Bank v. Jones*, 59 Ala. 123.

² *Black v. Vaughan*, 70 Tex. 47; s. c. 7 S. W. Repr. 604; *Phifer v. Barnhart*, 88 N. C. 333; *Chamberlain v. Spargur*, 86 N. Y. 603; *Nellis v. Munson*, 108 N. Y. 453; s. c. 15 N. E. Repr. 739; *Thomas v. Thomas*, 10 Ired. 123.

³ *Roads v. Symmes*, 1 Ohio, 315; *Ryan v. Carr*, 46 Mo. 483; *Clarke v. Tucker*, 6 Vt. 81; *Adams v. Buchanan*, 49 Mo. 64; *DeHavens Appeal*, 38 Pa. St. 373.

married women in states where a separate examination is required.¹ In Alabama the statute requires a deed to be attested by witnesses, but provides that acknowledgment before an officer dispenses with the necessity of such attestation; and it is held that without either witnesses or acknowledgment, a deed is insufficient to convey title to land.² In North Carolina a deed is held not to convey a perfect legal estate until duly registered.³

§55. Acknowledgment Necessary to the Record.

As already stated, acknowledgment is in most states held necessary to a valid registry, and without it, or with defective acknowledgment, the record will not impart constructive notice.⁴ Where the acknowledgment is in due form, a latent defect, such as that the officer acted out of his jurisdiction, will not prevent the record from imparting notice.⁵ Numerous illustrations of the rule that a defective acknowledgment will not support the record, are given throughout the succeeding sections of this chapter.

¹ Civ. Code of Cal. §1186. See *post*, chap. 4; *Hitz v. Jenks*, 123 U. S. 298. In Arkansas, since the constitution of 1874, the wife's deed conveys title without acknowledgment, although acknowledgment is still requisite to recording. *Criscoe v. Hambrick*, 47 Ark. 235; s. c. 1 S. W. Repr. 150.

² Code of Ala. §§2144-2146; *Stults v. Kohn*, 64 Ala. 186.

* *Phifer v. Barnhart*, 88 N. C. 333; *Robinson v. Willoughby*, *supra*.

A deed is valid at common law between the parties, if signed, sealed and delivered, though not witnessed, acknowledged or recorded. *Good-enough v. Warren*, 5 Saw. 494, 498; *Clarke v. White*, 12 Pet. 178, 197.

In Alabama, a deed without acknowledgment or witnesses does not convey the legal title, but may be enforced as an agreement to convey. Code §§2145-6; *Carpenter v. Hall*, 83 Ala. 171; *Evans v. Richardson*, 76 Ala. 329; *Lord v. Folmar*, 57 Ala. 615. As to New York, see *Nellis v. Munson*, 108 N. Y. 453, 457.

⁴ *Bank v. Neal*, 28 W. Va. 744; *Cox v. Wayt*, 26 *Id.* 807; *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772; *Bass v. Estill*, 50 Miss. 300; *Willard v. Cramer*, 36 Iowa, 22; *Peters v. Clements*, 46 Tex. 115; *Crad-dock v. Merrill*, 2 Tex. 494; *Todd v. Outlaw*, 79 N. C. 235; *Greenwood v. Jenswold*, 69 Iowa, 53; s. c. 28 N. W. Repr. 433; *Irwin v. Welsh*, 10 Neb. 479; *Blood v. Blood*, 23 Pick. 83; *Herndon v. Kimball*, 7 Ga. 472; and cases cited in note 1, §52. *ante*.

⁵ *Titus v. Johnson*, 50 Tex. 224; *Peterson v. Lowry*, 48 Tex. 408; *Heilbrun v. Hammond*, 13 Hun. 474; *Stevens v. Hampton*, 46 Mo. 404.

§56. Acknowledgment as Proof of Execution.

An important effect given by most of the statutes to the probate of an instrument, or to its probate and record, is that this is made a substitute for the common law proof of the execution of the instrument when offered in evidence.¹ This effect depends entirely upon the statute, and is usually made only *prima facie* proof, sufficient in cases where the genuineness of the instrument is not impeached by the other party under affidavit, but not otherwise.² The ac-

Objection that a mortgage of the property of two persons purporting to be partners, was executed by one of them only, and that there was no proof of partnership, held to be obviated by the act of the other party in acknowledging before a notary public, that his co-partner was authorized to execute the instrument. *Haldeman v. Knight*, Dallam (Tex.), 556.

In Illinois, where the statute requires an acknowledgment of a chattel mortgage taken by a justice to be entered up on his docket, a failure to so enter it vitiates the record as notice. *Koplin v. Anderson*, 88 Ill. 120; *Frank v. Miner*, 50 Ill. 444; *Porter v. Dement*, 35 Ill. 478.

¹ Code of Ala. (1876), §2154; *Simmons v. Havens*, 101 N. Y. 427; s. c. 5 N. E. Repr. 73; *Stimson's Am. Stat. Law*, §§1572, 1625; *Ballard v. Perry*, 28 Tex. 347; *Carpenter v. Dexter*, 8 Wall. 532; *Samuels v. Borrowscale*, 104 Mass. 207; *Mixer v. Bennett*, 70 Iowa, 329; s. c. 30 N. W. Rep. 587; *Reed v. Kemp*, 16 Ill. 445; *Houghton v. Jones*, 1 Wall. 702. A duly recorded bill of sale is held in Texas to come within the statute, and to be admissible in evidence without proof of its execution. *Morrow v. State*, 22 Tex. Ct. App. 239; s. c. 2 S. W. Repr. 624.

Acknowledgment or proof of the deed does not usually make it admissible in evidence, unless it is also recorded. In Delaware, the private examination of a married woman, duly taken and certified, remains valid, though the deed is not recorded. Rev. Code (1874), ch. 83, §16.

The statutes of New York on this subject date back to 1788. *Jackson v. Shephard*, 2 Johns. 76; and perhaps even to 1710. *Hunt v. Thompson*, 19 N. Y. 279. A copy of an enrolled deed is by the English law as good evidence as the original; and so in South Carolina until *Purvis v. Robinson*, 1 Bay, 45. Even now slight proof of loss is sufficient. *Peay v. Pickett*, 3 McCord, 318.

² *Williams v. Griffin*, 4 Jones (N. C.) L. 31; *Brook v. Headen*, 13 Ala. 370; *Payne v. McKinney*, 30 Ga. 83; *Mullis v. Cavins*, 5 Blackf. 77; *Robertson v. Kennedy*, 1 Stew. 245; *Clark v. Troy*, 20 Cal. 219; *Hutchinson v. Rust*, 2 Gratt. 394; *Hinchliff v. Hinman*, 18 Wis. 135; *Keichline v. Keichline*, 54 Pa. St. 75; *Young v. Ringo*, 1 Mon. 30; *Doe v. Prettyman*, 1 Houst. 339; *Jackson v. Shephard*, 2 Johns. 77; *Strong v. Smith*, 3 McLean, 362; *Ferris v. Boxell*, 34 Minn. 392; s. c. 25 N. W. Repr. 592; *Holland v. Carter*, 79 Ga. 139; s. c. 3 S. E. Repr. 690; *Catlin v. Ware*, 9 Mass. 218; *Eichelberger v. Sifford*, 27 Md. 320; *Wharton on Ev.* §§740, 118, 115; *Belcher v. Fox*, 60 Tex. 527; *Jordan v. Robson*, 27 Tex. 612.

knowledge may be made after the suit has been filed.¹ The statutes, as a rule, provide also that upon proof of loss of an original instrument that has been recorded, and in some instances without such proof, a certified copy from the record may be read in evidence with the same effect as the original.² Where the deed embraces land in two counties and has been recorded in one of them, a certified copy, the absence of the original being accounted for, is admissible as evidence in a suit in the other county in relation to the tract there.³ But such certified copy could not be recorded in the second county so as to impart constructive notice, in the absence of a statute expressly authorizing such record, as the general law of registry contemplates only the record of original instruments.⁴ A certified copy of a deed recorded in the wrong county (as where the land does not lie, or where such record was not authorized to be made), is of no avail, either as evidence or for purposes of re-record.⁵ In those states where acknowledgment is no

¹ *Lanning v. Dolph*, 4 Wash. C. C. 624; *Secrest v. Jones*, 30 Tex. 596; *Shelden v. Stryker*, 42 Barb. 284; s. c. 27 How. 387; *Fisher v. Butcher*, 19 Ohio, 406; s. c. 53 Am. Dec. 436. The rule does not apply to deeds of married women. *Carn v. Harsley*, 22 Fla. 317, citing *Hollingsworth v. Flint*, 101 U. S. 591; *Jones v. Loftin*, 16 Fla. 189. As to proof of a recorded deed in Illinois, see *Stebbins v. Duncan*, 108 U. S. 32.

² Rev. Stats. of Tex. §2257; Howell's Stats. of Mich. (1882), §5685; Rev. Code of Iowa (1873), §3660; Code of Ga. (1882), §2713; Stimson's Am. Stat. Law, §1625; *Hood v. Mathers*, 2 Mar. (Ky.), 558; *Peay v. Pickett*, 3 McCord (S. Car.), 318.

³ *Wilt v. Cutler*, 38 Mich. 189; *Scott v. Leather*, 3 Yeates, 184; *Jackson v. Rice*, 3 Wend. 180; *McKean v. Delancy*, 5 Cranch, 29; *Simms v. Read*, 3 Tenn. 345; *Hancock v. Tram Lumber Co.*, 65 Tex. 225, in which last case it is said by Judge Stayton, that valid registration establishes the execution of the deed for the purposes of evidence in all counties of the state, since a rule of evidence could not apply to one county and not to another. But the record of a deed in another state, does not make it admissible in evidence. *Papot v. S. W. Ry. Co.*, 74 Ga. 296; *Baskins v. Vernon*, *Id.* 370.

⁴ *St. John v. Conger*, 40 Ill. 635; *Marsden v. Cornell*, 62 N. Y. 215; *Oatman v. Fowler*, 43 Vt. 462; *Porter v. Dement*, 35 Ill. 478; *Lund v. Rice*, 9 Minn. 50.

⁵ *Uhl v. Musques*, 1 Tex. Un. Cas. 650; *Lewis v. Baird*, 3 McLean, 56; *Pollard v. Lively*, 2 Gratt. 216, and cases cited in notes 3 and 4, *supra*.

longer necessary to valid registry, it is still required where it is proposed to use the instrument in evidence without making proof of its execution.¹

§57. By Whom Acknowledgment to be Made.

The instrument must be acknowledged by the grantor in person, and the certificate must show this fact with reasonable certainty.² A certificate made on the assurance of another that the grantor had executed the deed, is invalid.³ A deed purporting to have been signed and acknowledged by a firm, in the firm name only, is not entitled to record.⁴ A certificate that A. acknowledged the deed when A. was the grantee and B. the grantor, was held fatally defective.⁵ A deed purporting to have been made and acknowledged by *Hiram* Sherman, but signed by *Harmon* Sherman, was held not admissible in evidence on the acknowledgment alone.⁶

¹ Hurd's Rev. Stats. of Ill. (1882), ch. 30, §31; *Stallcup v. Pyron*, 33 La. Ann. 1249; Code of La., §2253; *Ferris v. Boxell*, 34 Minn. 262; s. c. 25 N. W. Repr. 592; *Morrison v. Porter*, 35 Minn. 425.

In *Hastings v. Vaughan*, 5 Cal. 315, a deed was offered in evidence as a recorded instrument, but rejected for want of a notarial seal to the certificate of acknowledgment, and it does not appear that any proof of its execution was offered. Justice Heydenfeldt rendering the opinion, says that it "should have been allowed in evidence with instructions to the jury as to its effect in giving notice to third persons;" but the decision is not full enough to be satisfactory.

Where the suit was on a title bond, and for specific performance, and the execution of the bond was not denied by the defendant by written affidavit filed, as required by the Texas statutes, the instrument was held as fully proved; and such proof dispensed with the necessity of registry to make it admissible as a recorded instrument. *Yeary v. Cummins*, 28 Tex. 91.

² *Hinde v. Longworth*, 11 Wheat. 199; *Smith v. Hunt*, 13 Ohio, 260.

³ *Mays v. Hedges*, 79 Ind. 288; *Hoban v. Piquette*, 52 Mich. 346.

⁴ *Sloan v. Owens*, 79 Mo. 206, and *contra*. *Baldwin v. Richardson*, 33 Tex. 16, with dissenting opinion by C. J. Morrill. An acknowledgment by one partner is sufficient for a partnership deed signed with the firm name. *McCoy v. Baley*, 21 Fla. 803; but not if the deed is signed with the individual names of the partners. *Sanders v. Papoon*, 4 Fla. 465.

⁵ *Wood v. Cochrane*, 39 Vt. 544; *Magness v. Arnold*, 31 Ark. 103. In *Wise v. Postlewait*, 3 W. Va. 452, a certificate was held good which recited that the deed was "signed, sealed and acknowledged," although it did not mention the name of the grantor.

⁶ *Boothroyd v. Engle*, 23 Mich. 19.

But where there is a discrepancy as to the name, resort may usually be had to the body of the deed to support the certificate.¹ The law knows but one christian name, and the insertion or omission of a middle name or initial is usually immaterial.² If the grantor be unable to speak the English language, the acknowledgment may be made through an interpreter.³ So, also, where the grantor is a deaf mute.⁴

§58. Acknowledgment by One of Several Grantors.

In a few states it is provided by statute that a deed by two or more grantors will be sufficiently authenticated for

Chandler v. Spear, 22 Vt. 388; Lyon v. Kain, 36 Ill. 362, and see Waters v. Spofford, 58 Tex. 115.

¹ Page v. Arnim, 29 Tex. 53; Banks v. Lee, 73 Ga. 25; Schofield v. Jennings, 68 Ind. 232; James v. Stiles, 14 Pet. 322; Dunn v. Gaines, 1 McLean, 321; Erskine v. Davis, 25 Ill. 251; Waters v. Spofford, 58 Tex. 115. It has been held that a deed to Mitchell Allen, followed by one from Michael Allaine, is not a fatal variance, and will be presumed to be from the same person. Chiniquy v. Catholic Bishop, 41 Ill. 148; Warvelle on Abstracts, 180; Chamblee v. Tarbox, 27 Tex. 140; Crosby v. Vleet, 3 N. J. L. 86.

In tracing title, identity of names is *prima facie* evidence of identity of persons. Stebbins v. Duncan, 108 U. S. 32; Chamblee v. Tarbox, 27 Tex. 139; Brown v. Metz, 33 Ill. 339; Gitt v. Watson, 18 Mo. 274; Bogue v. Bigelow, 29 Vt. 179.

A deed by one in his right name is valid, although it be different from the name by which, as vendee, the land was conveyed to him. Fallon v. Kehoe, 38 Cal. 44; s. c. 99 Am. Dec. 347; Cordier v. Cage, 44 Tex. 532.

The registry of a deed signed "James Howes" is notice of a deed by James N. Howes. Gillespie v. Rogers, 146 Mass. 610. A man by the name of Germain Sirois, who was also sometimes called John Kever, made an assignment under the name of Joseph Cyr, which name he signed by his mark, being unable to read or write. There was no intent of misleading anybody; it was a mistake, the man being an ignorant foreigner who could not speak English. *Held*, the registry was constructive notice as against attaching creditors. Quilmet v. Sirois, 124 Mass. 162, citing Gifford v. Rockett, 121 Mass. 431.

² Waltee v. Weaver, 57 Tex. 569; Rev. Stats. of Tex., §4321; Norton v. Meador, 4 Saw. 603; Chestnut v. Shane, 16 Ohio, 599; Civ. Code of Cal., §1201; De Arnaz v. Escandon, 59 Cal. 486; Devlin on Deeds, §§537, 538; *contra*, Dewey v. Campau, 4 Mich. 565.

³ In the matter of Harper, 6 Man. & G. 732. See §§76-78, *post*, for further cases in relation to the identification, in the certificate, of the grantor as the one who made the acknowledgment.

record by the acknowledgment of any one of them.¹ It is, of course, competent for the legislature to enact such provision, and to authorize registry without any acknowledgment whatever, but in the absence of special provision such as that just referred to, the record of a deed by several grantors, acknowledged by one alone, unless it conveyed partnership property, would properly be constructive notice only of a conveyance of the interest or title of the one who acknowledged. There is a Massachusetts case,² decided prior to the statute of that state which now gives full effect to such acknowledgment, in which it is held that the registry of a deed by two, but acknowledged by one only, is presumptive, if not conclusive evidence of notice to creditors or subsequent purchasers of the other; and whether the grantors were seized as joint tenants in common, or respectively seized of distinct parts, is immaterial. Acknowledgment is in truth a matter of but little consequence, and could, by statute, be properly dispensed with entirely; but so long as its requirement is retained, the courts should be consistent in their construction of the law; and this decision is not in harmony with the well established judicial construction of the registry acts. The reasoning of the court in the case above referred to, is that the object of the statute is to give publicity to conveyances, and that this object is attained as well by a record made on the acknowledgment of one only. But equal publicity would be attained by a record made without any acknowledgment at all. The theory on which one is charged with constructive notice of a recorded deed of which he has no actual knowledge whatever, is that the law of record has been fully complied with, in matters of form as well as substance, as it is by force of the law alone that the notice arises. That the record of a

¹ Pub. Stats. of Mass. (1882), ch. 120, §6; Rev. Stats. of Maine (1883), ch. 73, §17; Rev. Code of Del. (1874), ch. 83, §3; Brightley's Dig. of Penn. (1872), *Deeds, etc.*, 10 and 74.

² *Shaw v. Poor*, 6 Pick. 86.

deed from A. to B. should be held constructive notice of a conveyance of a separate tract or parcel by C. to B. or even to D., because this matter is also embraced in the instrument, does violence to the settled rules of interpretation which the courts have almost uniformly applied to the registration law; nor is the case different in principle where both or all the grantors convey undivided interests in the same tract, since each interest or title is a thing in law as distinct as though it related to a different property.¹

§59. Acknowledgment by Agents and Trustees.

A number of the statutes require that where the acknowledgment is by an agent or attorney in fact, the certificate thereof must show the instrument to have been acknowledged as the act and deed of the principal.² It is usually stated as a general proposition, without reference to any special statutory provision, that the certificate must show with reasonable clearness that the acknowledgment was made by the agent on behalf of the principal, and as being the act and deed of the principal.³ This course of decision is from analogy to the common law requirement that the deed of the agent must be in the name of the principal

¹ This case of *Shaw v. Poor* was decided in 1827, while the law of registration was yet in a formative stage. Justice Wilde comments on the opinion of Lord Redesdale, in *Bushell v. Bushell*, 1 Sch. & L. 90, denying that registry is constructive notice, and deduces therefrom that his lordship admits that "registry is notice to a certain extent;" and he says that if it is presumptive evidence only, yet in the present case that is sufficient, as "there is no other evidence touching the question of notice, so that nothing appears to repel the presumption of notice arising from the registry." Had there been other evidence, the decision might have been different, and the record have been held not to impart *presumptive* notice. The case is reported also in 17 Am. Dec. 347, and is followed in *Palmer v. Palmer*, 75 Mass. (9 Gray), 56.

² Hittell's Codes of Cal., §6192; Civ. Code of Dak., §666; Session Acts of Minn. (1883), p. 99, §2; Session Laws of Mo. (1883), p. 20, §1.

³ *North v. Henneberry*, 44 Wis. 306; *McDaniels v. Flower Brook*, 22 Vt. 274; *Story on Agency*, §§273, 277, 278; *Eowler v. Shearer*, 7 Mass. 19; *Shanks v. Lancaster*, 5 Gratt. 110; *Hackney v. Butts*, 41 Ark. 394; *Evans v. Wells*, 22 Wend. 325; *Elwell v. Shaw*, 16 Mass. 42; *McDonald v. Bear River Co.*, 13 Cal. 235; *Clarke v. Courtney*, 5 Pet. 319; *Bigelow v. Livingston*, 28 Minn. 57.

and purport distinctly and fully to be the deed of the principal in order to bind him;¹ but the application of the rule to the certificate of acknowledgment is not based on any sound reason. The certificate is not a part of the deed, which, upon delivery, conveys title without acknowledgment, and which may be proved aside from any acknowledgment.² The agent declares to the officer that the signature to the instrument is genuine and made by him, but the effect of the signature, the capacity in which the agent acts, and the legal effect of the deed as binding the constituent or not, are matters to be determined from the deed itself, rather than from verbal declarations of the agent made to the officer, and by the latter embodied in his certificate. In Texas the strict common law construction of deeds by agents and attorneys is not adopted, and a deed executed and acknowledged by the attorney in his own name, will, in a proper case, be upheld as the deed of the principal.³

Where a deed is made and acknowledged by a trustee, a description of him in the certificate by name, without reference to his fiduciary capacity, is sufficient.⁴ If a sheriff's deed be executed by a deputy, the latter is the proper person to acknowledge it; and a certificate stating that the sheriff, naming him, "by W. T. S., deputy," personally appeared before the notary and acknowledged the execution of the deed, for the purposes "and in the capacity therein set forth," was held sufficient.⁵ So a certificate

¹ See cases last cited, and *Coombe's Case*, 9 Co. R. 766; 3 Wash. on Real Prop. (4th ed.), 277; *Story on Agency*, §148; *Brinley v. Mann*, 2 Cush. 377; s. c. 48 Am. Dec. 669; 2 Kent's Com. 631; *Locke v. Alexander*, 2 Hawks, 155; s. c. 11 Am. Dec. 750.

² See *post*, §51; *Davis v. Living* (W. Va.), 9 S. E. Repr. 84.

³ *Giddens v. Byers*, 12 Tex. 75, in which the comments of Ch. J. Hemphill on the common law rule are very pointed. The Texas rule is said to have been derived, through Mexico, from the civil law of Spain. *Hanrick v. Barton*, 16 Wall. 166, 173. But see *Echols v. Cheney*, 28 Cal. 157.

⁴ *Dail v. Moore*, 51 Mo. 589. A certificate of acknowledgment by an agent as *his* act and deed, is ratified by the principal subsequently signing the deed. *Sowden v. Craig*, 26 Iowa, 126; s. c. 96 Am. Dec. 125.

⁵ *Terrell v. Martin*, 64 Tex. 121. But legislation and judicial decision combined cannot make correct the statement that a man personally

that personally came before the officer, A. B. (the principal), by C. D., his attorney in fact, the signer and sealer of the foregoing deed, and acknowledged the same to be his own free act and deed—has been held to show a sufficient acknowledgment for the principal.¹

§60. Acknowledgment on Behalf of Corporations.

Quite a number of the statutes designate who shall execute and acknowledge deeds on behalf of corporations, and usually the form of the certificate is prescribed. Where there is no statute of the kind, the officer affixing the corporate seal is held to be the proper person to make the acknowledgment,² and it seems that the cashier of a bank is the one to affix its seal, and although the president sign with him, the cashier's acknowledgment alone is sufficient.³ If there be no statutory provisions to the contrary, a deed purporting to be that of a corporation, signed by its officers as such, and with the corporate seal affixed, is admissible in evidence as the deed of the corporation, and is itself presumptive proof of the regular and duly authorized execution of the same.⁴ The certificate of acknowledgment, unless one be prescribed in terms by the statute, should state the official position of the officer affixing the corporate seal, his authority, that he knows the corporate seal, and that the same is affixed by order of the board of directors, or other

appears by an agent or deputy, and there is no legal necessity for such absurdity. See *Beaumont v. Yeatman*, 8 Humph. 542.

¹ *Williams v. Livingston*, 9 N. W. Repr. (Minn.), 31. An acknowledgment by an attorney in fact, in the usual form for a grantor acting in person, except that the certificate mentioned that the person acknowledging was attorney in fact for the grantor named, held sufficient. *McAdow v. Black*, 6 Mont. 601; s. c. 13 Pac. Repr. 377.

² *Kelly v. Calhoun*, 95 U. S. 710; *Lovett v. The Steam Saw Mill Co.*, 6 Paige, 54, 60.

³ *Merrill v. Montgomery*, 25 Mich. 73; *Johnson v. Bush*, 3 Barb. Ch. 207. In Texas the statute designates the president. Rev. Stats., §600; *Muller v. Boone*, 63 Tex. 91.

⁴ *Warvelle on Abstracts*, 236; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543; *Sawyer v. Cox*, 63 Ill. 130; *Solomon's Lodge v. Montmallin*, 58 Ga. 547.

trustees of the corporation, and that he subscribed his name thereto as a witness of the execution thereof.¹

§61. Before Whom Acknowledgment to be Made.

The statutes of each state designate the officers who are authorized to take and certify acknowledgments and proof of deeds and other instruments. Unless the acknowledgment is taken by an authorized officer, it is invalid.² It would seem that any officer who by law uses an official seal, would be a proper person to take an acknowledgment; but each state has seen fit to arbitrarily select certain classes of officers by name, and no two statutes entirely agree in this particular. The officers named embrace every grade, from Justice of the Supreme Court of the United States³ to a

¹ Lovett v. Steam Saw Mill Co., *supra*. At common law, the signature of the corporation is its corporate seal; City of Tiffin v. Shawhan, 9 Am. & Eng. Corp. Cas. 556; Beckwith v. Windsor Co., 14 Conn. 594; Frankfort Bank v. Anderson, 3 A. K. Marsh. 932; and while it is usual to sign the corporate name (Flint v. Clinton Co., 12 N. H. 430), it is not necessary; Angell & Ames on Corp., §225; Osborne v. Tunis, 1 Dutch. (N. J.), 633; unless it is required by statute. Isham v. Bennington, 19 Vt. 251.

The Texas statute requires (the form of certificate not being prescribed), that the deed shall be signed by the president and by him acknowledged "to be the act of the corporation;" and an acknowledgment by the president and cashier, described as such in the deed and certificate, stating that they acknowledged that they executed the deed "for the purposes and considerations therein contained," was held to sufficiently show its acknowledgment as act of corporation. Muller v. Boone, 63 Tex. 91; see Eppricht v. Nickerson, 78 Mo. 483. In Tenny v. East Warren Co., 43 N. H. 343, the officers were not described as such in the certificate, and their acknowledgment of the instrument as "their free act and deed," was held sufficient. So of "his" deed, for "its" deed, in the certificate. Frostburg v. Brace, 51 Md. 508.

² Baze v. Arper, 6 Minn. 220; Simpson v. Montgomery, 25 Ark. 365; s. c. 99 Am. Dec. 228; Johnson v. Haines, 2 Ohio, 25; s. c. 25 Am. Dec. 533.

The preamble to the statute of 1771 recited it to have been an ancient practice to record deeds upon acknowledgment or proof before a member of his majesty's privy council, and this was held to warrant the presumption that such person had the requisite authority in 1725. Hunt v. Thompson, 19 N. Y. 279.

³ Brightly's Pur. Dig. of Pa. (1872), *Deeds, etc.*, §16. In North Carolina, all judges were authorized to take acknowledgments prior to the Code. Dugger v. McKesson, 100 N. C. 1; s. c. 6 S. E. Repr. 746.

major of the army,¹ and a provost-marshal²—the differences in the statutes seeming to have their origin entirely in local caprice.³ Notaries public and commissioners of deeds are embraced in all, or nearly all, of the statutes.⁴ In a few instances the authority of justices of the peace and other inferior officers is limited to taking the acknowledgment of deeds only where the lands lie in their counties;⁵ and usually, also, they are mentioned only in the class designated to take acknowledgments for the home state. Where they are authorized to take acknowledgments out of the state, a certificate of magistracy and conformity, by some officer of a court of record, is usually required.⁶ In Arkansas it seems that a justice of the peace can take an acknowledgment anywhere within the state,⁷ but in Missouri only within his own county.⁸

The judge of a court of record in another state is not now authorized to take acknowledgments for Texas. *Talbert v. Dull*, 70 Tex. 975; s. c. 8 S. W. Repr. 530.

¹ Pub. Stats. of R. I. (1882), ch. 173, §3.

² *Paul v. Carpenter*, 70 N. C. 502.

³ In Delaware it requires the combined efforts of two justices of the peace to take an acknowledgment. Rev. Code (1874), ch. 83, §3. This seems also to have been the law of Kentucky, under the act of 1792. *Brown v. Swift* (Ky.), 1 S. W. Repr. 474; *Stansberry v. Pope*, 4 Bibb. 492; *Smith v. White*, 1 B. Mon. 19; *Harris v. Price*, 14 B. Mon. 333; *Littell's Sel. Cases*, 292, 461, 156. Where such law exists, an acknowledgment before only one justice is not good. *Dufphey v. Frenage*, 5 St. & P. (Ala.), 215; even though he act under a *dedimus*. *Malloy v. Bruden*, 88 N. C. 305.

⁴ A notary is an officer known to the common law. *Kirksey v. Bates*, 7 Porter, 529, and his seal is evidence of his official character. *Harding v. Curtis*, 45 Ill. 252; in all countries. *Orr v. Lacy*, 4 McLean, 243.

⁵ *Gatewood v. Hart*, 58 Mo. 261. See *Womack v. Hughes*, *Littell's Sel. Cas.* 292.

⁶ As to these certificates, see *post*, §74.

⁷ *Biscoe v. Byrd*, 15 Ark. 655. But if he is outside of his state when taking it, his action will be void. *Cowan v. Beall*, 1 MacArth. 270; yet if the certificate is regular on its face, the record will impart constructive notice, §52, *ante*.

⁸ *Gatewood v. Hart*, 58 Mo. 261; *Bishop v. Schneider*, 46 Mo. 472; s. c. 2 Am. Rep. 533; and to same effect, *Grove v. Todd*, 41 Md. 633.

§62. Deputies, Magistrates, etc.

Where an officer empowered to take acknowledgments is authorized by law to appoint a deputy, the deputy has in this respect the same authority of his principal;¹ and the rule has been held to apply where the duties of the deputy are not specified by the statute.² Where an acknowledgment is taken in another state by a deputy clerk, it will be presumed that by the law of the state where taken, the appointment of such deputy is authorized, and that the deputy was regularly appointed.³ Properly where an acknowledgment is taken by a deputy, the certificate should read in the name of the principal, by the deputy, and in some instances this has been required;⁴ but certificates in the name of the deputy alone have by other courts been held sufficient.⁵

The term "magistrate" is not confined to persons who exercise general judicial powers; hence it was held that an alderman of Philadelphia was a magistrate within the meaning of a statute of Maine authorizing magistrates in other states to take acknowledgments.⁶

¹ *West v. Schneider*, 64 Tex. 327; *Touchard v. Crow*, 20 Cal. 150; s. c. 81 Am. Dec. 108; *Young v. Boardman* (Mo.), 10 S. W. Repr. 48; *Lynch v. Livingston*, 8 Barb. 463; *Kemp v. Porter*, 7 Ala. 138; *Muller v. Boggs*, 25 Cal. 175; *Gordon v. Leech*, 81 Ky. 229; *Babbitt v. Johnson*, 15 Kan. 252; *Gibbons v. Gentry*, 20 Mo. 468; *Hope v. Sawyer*, 14 Ill. 254; *Abrams v. Erwin*, 9 Iowa, 87; *Marx v. Hanthorn*, 30 Fed. Repr. 579.

² *Muller v. Boggs*, *supra*; *Devlin on Deeds*, §473. Deputy clerks are not authorized to take acknowledgments in North Carolina. *Tatom v. White*, 95 N. C. 453.

³ *Hope v. Sawyer*, 14 Ill. 254.

⁴ *Abrams v. Erwin*, 9 Iowa, 87; *Gibbons v. Gentry*, 20 Mo. 468; *Talbott v. Hoosier*, 12 Bush, 408.

⁵ *Beaumont v. Yeatman*, 8 Humph. 542; *Touchard v. Crow*, 20 Cal. 150; *McRaven v. McGuire*, 1 S. & M. (17 Miss.), 34; *Devlin on Deeds*, §474.

⁶ *Gordon v. Hobart*, 2 Sumu. 401, 404. So, an American consul at a foreign port, has been held a magistrate within the meaning of a similar statute. *Scanlan v. Wright*, 13 Pick. 523; s. c. 25 Am. Dec. 344; and see *Palmer v. Stevens*, 11 Cush. 147; *Welsh v. Hill*, 2 Johns. 373. But a mayor of a town held not authorized by a statute designating "mayor of a city." *Dundy v. Chambers*, 23 Ill. 369.

§63. Ex-Officio Officers.

Where the statute authorizes an officer, as a notary public, to take acknowledgments, the fact that he is a notary only *ex-officio* will not make any difference; and the rule has been held to apply to officers without as well as within the state; the recital in the certificate that he is *ex-officio* a notary being sufficient to authorize the presumption that he is legally such by the laws of his state.¹ The statutes of Texas made primary judges *ex-officio* notaries, and elsewhere authorized notaries to take acknowledgments. An acknowledgment taken by an officer whose certificate recited him to be a primary judge, and who signed as primary judge only, was held sufficient. The recitation showed that he was authorized to take the acknowledgment, since, being primary judge, it followed as matter of law that he was also a notary, and it was immaterial that he did not in terms purport to act in his capacity as notary.²

§64. De Facto Officers.

Where an officer belonging to the class authorized to take acknowledgments, is without proper political authority, it has been held, in Kentucky, that he is not an officer either *de jure* or *de facto*; his acts are void, and a certified copy of a deed recorded on his certificate cannot be used in

¹ Wilson v. Simpson, 68 Tex. 312; s. c. 4 S. W. Repr. 489; and see Mott v. Smith, 16 Cal. 533. But where the certificate fails to show that a circuit clerk in another state, who makes it, is *ex-officio* county clerk, this will not be presumed, and proof of the laws of such other state is not admissible to show it and supply such defect in the certificate. People v. Register of N. Y., 6 Abb. 180.

² Butler v. Dunnagan, 19 Tex. 560. So, where a judge of the Supreme Court was *ex-officio* a justice of the peace, and as such justice authorized to take acknowledgments, it was held not necessary for him in signing the certificate, to designate himself as such justice—the land, it seems, lying in his own state. Middlebury College v. Cheney, 1 Vt. 336, 350; and see Welles v. Cole, 6 Gratt. 645.

If the statute expressly required notaries to use a seal, and the primary judge in the case above had used his seal as judge, and not his notarial seal, *quere*? The cases do not present any question as to the use of the seal in such instances.

evidence.¹ The general rule is that although the government under which the officer acts be unlawful and revolutionary, yet if it is a government *de facto*, of paramount force within the district where the officer exercises his functions, his official acts, not directly in aid of the insurrectionary war power of such government, will be valid and binding.² An officer who continues to exercise the functions of his office after his commission has expired, is an officer *de facto*, and an acknowledgment taken by him has been sustained;³ and the rule has even been applied where such officer had removed into another state, but kept an office and continued business in the county for which he was originally appointed, and continued to act as an officer there.⁴ One who acts as a notary without having been duly commissioned, is an officer *de facto*, and an acknowledgment taken by him cannot be attacked collaterally;⁵ but where, by the acceptance of an incompatible office, the notary had ceased to be such, *de jure*, for some time previous to taking a deposition, this latter act alone was held not sufficient to constitute him a notary *de facto*.⁶

¹ Simpson v. Lovering, 3 Bush, 458; s. c. 96 Am. Dec. 252.

² Texas v. White, 7 Wall. 700; s. c. 25 Tex. Sup. 467, 608; Henning v. Fisher, 6 W. Va. 238; Griffin v. Cunningham, 20 Gratt. 31; Scherfy v. Argenbright, 1 Heisk. (Tenn.) 128.

³ Gilbraith v. Gallwan, 78 Mo. 452; Farmer's Bk. v. Chester, 6 Humph. 458; Brown v. Lunt, 37 Me. 423; but compare Grotenkemper v. Carver, 4 Lea (Tenn.), 375.

⁴ Prescott v. Hayes, 42 N. H. 56.

⁵ Hamilton v. Pitcher, 53 Mo. 334.

⁶ Biencourt v. Parker, 27 Tex. 558. "The mere assumption of an office by performing one or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute one an officer *de facto*." Burke v. Elliott, 4 Ind. Law. 355. See, as to what constitutes an officer *de facto*, McCraw v. Williams, 33 Gratt. 513; Leach v. Cassidy, 23 Ind. 449; Morton v. Lee, 28 Kan. 287; Carli v. Rhuer, 27 Minn. 293; Norton v. Shelby Co., 118 U. S. 425; Hamlin v. Cassafer, 15 Or. 456; s. c. 15 Pac. Repr. 778; White v. Burnley, 20 How. 246; Wilcox v. Smith, 5 Wend. 231; s. c. 21 Am. Dec. 213; Trustees v. Hills, 6 Cow. 23; s. c. 16 Am. Dec. 429; Allen v. McKeen, 1 Sum. 312; Doty v. Gorham, 5 Pick. 487; s. c. 16 Am. Dec. 417.

It is sufficient, though the officer describe himself in the certificate as a clerk *pro tem.*, if he was clerk *de facto*; as the temporary char-

§65. Local Jurisdiction of the Officer.

Where, as in many instances, the statutes require acknowledgments to be taken in the county or district where the grantor resides, or where the land lies, or for which the officer is appointed, unless the statute be complied with the acknowledgment will not be valid;¹ and if the want of such compliance appears on the face of the certificate, or of the deed and certificate together, the record will not impart constructive notice.² The decisions involving questions as to the local jurisdiction of the officer taking the acknowledgment, are usually controlled by the terms of the statute. But in cases where there is an absence of express or definite terms of restriction, in the statutes, as to the territorial jurisdiction of the officer, there is a conflict of judicial decision on the subject. On the ground that the act is ministerial and not judicial, it has been held that a judge may take an acknowledgment even outside of his state,³ but this is denied by other courts.⁴ The current of authority seems

acter of his tenure of office does not affect the question. *Woodruff v. McHarry*, 58 Ill. 218; and see *Cocke v. Halsey*, 16 Pet. 71.

A notary public cannot delegate his official authority to a clerk. *Sheldon v. Benham*, 4 Hill, 129; s. c. 40 Am. Dec. 271; *Sacridier v. Brown*, 3 McLean, 483.

An acknowledgment is not void because the officer holds two incompatible offices, the statute not having declared which shall be forfeited. *Adam v. Mengel* (Pa.), 8 Atl. Repr. 606.

If the office does not exist *de jure*, the acts of the person are void. *Norton v. Shelby County*, 118 U. S. 425.

¹ *Share v. Anderson*, 7 Serg. & R. 43; s. c. 10 Am. Dec. 421; *McCulloch v. Myers*, 1 Dana, 522; *Hedges v. Ward*, 15 B. Mon. 106; *Hughes v. Wilkinson*, 37 Miss. 482; *Colton v. Seavey*, 22 Cal. 496; *Johns v. Rear-don*, 3 Md. Ch. 57; *Jackson v. Humphreys*, 1 Johns. 498; *Gittings v. Hall*, 1 Har. & J. 14; s. c. 2 Am. Dec. 502; *Cook v. Hager*, 3 Colo. 386; *Frank v. Miner*, 50 Ill. 444.

² *Titus v. Johnson*, 50 Tex. 224; *Heilbrun v. Hammond*, 13 Hun. 474.

³ *Moore v. Vance*, 1 Ohio, 1; *Kinsman v. Loomis*, 11 Ohio, 475. And a justice of the peace outside of his county; *Biscoe v. Byrd*, 15 Ark. 655; *Odiorne v. Mason*, 9 N. H. 30; *Learned v. Allen*, 14 Allen, 109; *Crumbaugh v. Kugler*, 2 O. St. 373.

⁴ *Jackson v. Humphrey*, 1 Johns. 498. A commissioner outside of his state held not authorized to take an acknowledgment; *Jackson v. Col-den*, 4 Cow. 266. But a mayor of a city held authorized to do so outside of his city. *Moore v. Moore*, 3 O. St. 154.

to be in favor of the view that taking an acknowledgment (excepting, perhaps, that of a married woman, where a separate examination is required), is an act ministerial in its character; and in the absence of statutory restriction, the authority attaches to the officer wherever he may be within his own state; and in any event, an acknowledgment so taken would be good between the parties, and also sufficient to sustain the record of the instrument as constructive notice to third persons, if the certificate on its face discloses no such want of jurisdiction.¹

§66. Presumptions as to Officer's Authority and Jurisdiction.

If the certificate purports to have been made by an officer authorized by law to take acknowledgments, and is in due form, it is in itself *prima facie* evidence that the officer had due authority and acted within its jurisdiction.² It is not necessary that the certificate state in terms that the officer is authorized to take acknowledgments,³ nor that he is acting within his territorial jurisdiction.⁴ The notarial seal is *prima facie* evidence that the person using it is a notary

¹ Peterson v. Lowry, 48 Tex. 408, 412; Heilbrun v. Hammond, 13 Hun. 474; Stevens v. Hampton, 46 Mo. 404.

An acknowledgment taken by a justice of the peace out of his state, is defective and void. Cowan v. Beall, 4 MacArth. 270; and so, in Missouri, out of his county; Bishop v. Schneider, 46 Mo. 472; s. c. 2 Am. Rep. 533. For further cases as to the territorial jurisdiction of the officer, see Hopkins v. Menderback, 5 Johns. 231; Duly v. Brooks, 30 Mo. 515; Howard v. McIntyre, 3 Allen, 572; Thurman v. Cameron, 24 Wend. 91; Dickerson v. Talbot, 14 B. Mon. 60; Harris v. Burton, 4 Harr. (Del.), 66; Lynch v. Livingston, 8 Barb. 463; 6 N. Y. 422.

² People v. Snyder, 41 N. Y. 397; Carpenter v. Dexter, 8 Wall. 513; Trustees v. McKechnie, 90 N. Y. 618; Harding v. Curtis, 45 Ill. 252; Evans v. Lee, 11 Nev. 194; Belo v. Mayer, 79 Mo. 67; Thompson v. Morgan, 6 Minn. 292; Tuten v. Gazen, 18 Fla. 751; Bell v. Fry, 5 Dana, 341; Hassler v. King, 9 Gratt. 115; Jackson v. Schoonmaker, 4 Johns. 161.

³ Livingston v. McDonald, 9 Ohio, 168; Sparrow v. Hovey, 41 Mich. 708.

⁴ Bradley v. West, 60 Mo. 33; Morrison v. White, 16 La. Ann. 100; Dunlap v. Daugherty, 20 Ill. 297; Sidwell v. Burney, 69 Mo. 144.

duly qualified.¹ A commissioner of deeds appointed for another state is an officer of the state from which he derives his appointment, and the courts of that state will take judicial notice of his official acts, which require no other authentication than his seal of office.² If the certificate fails to state the title of an officer authorized to take acknowledgments, such defect cannot usually be supplied by either presumption or proof.³ The acknowledgment of a deed before a commissioner of deeds for North Carolina in another state is not, it seems, sufficient without the adjudication of the clerk of the superior court of the county in North Carolina wherein the land lies.⁴

§67. Disqualification of Officer by Interest.

A party having a direct interest in the subject matter of the conveyance is thereby disqualified, as an officer, from taking the acknowledgment to it.⁵ Thus, the grantee can-

¹ *Brown v. Phil. Bank*, 6 Serg. & R. 484; *Harding v. Curtis*, 45 Ill. 252; *Stephens v. Williams*, 46 Iowa, 540. But where the law requires the officer to state his title in the certificate, the omission by a notary to state of what county he is notary, has been held to vitiate, though the name of his county appears on his seal affixed to the instrument, *Willard v. Cramer*, 39 Iowa, 22; *Greenwood v. Jenswold*, 69 Iowa, 533; s. c. 28 N. W. Repr. 433. Where a notary described himself in the certificate as being within and for the county of L., but to his signature added "Notary Public. H. Co.," the deed was held admissible in evidence. *Merchant's Bank v. Harrison*, 39 Mo. 433.

² *Smith v. Van Gilder*, 26 Ark. 527; *Vance v. Schuyler*, 1 Gilm. (6 Ill.) 160.

³ See *post*, §73; *People v. Register of N. Y.*, 6 Abb. 180; *De Second v. Culver*, 10 Ohio, 188.

Where the statute authorized justices of the peace in another state to take acknowledgments, and the acknowledgment was taken in another state by two aldermen of New York city, describing themselves as such, it was held sufficient; the presumption being indulged that aldermen were *ex-officio* justices, that being generally the case with aldermen of cities. *Welles v. Cole*, 6 Gratt. 645.

⁴ *Evans v. Etheridge*, 99 N. C. 43; Code, §1250.

⁵ *Hammers v. Dole*, 61 Ill. 307; *Green v. Abraham*, 43 Ark. 420; *Davis v. Beasley*, 75 Va. 491; *West v. Krebaum*, 88 Ill. 263; *Jones v. Porter*, 59 Miss 628; *Withers v. Baird*, 7 Watts, 227; s. c. 32 Am. Dec. 754. In Georgia it does not invalidate the record that the notary who attests the deed is the attorney for both parties. *Wardlaw v. Mayer*, 77 Ga. 620.

not take the acknowledgment.¹ Nor can one who identifies himself on the face of the transaction as the agent of one of the parties.² So the commission to which a trustee is entitled, is a sufficient disqualification.³ But where the disqualifying interest in no way appears on the face of the papers, the record will nevertheless impart constructive notice.⁴

§68. Disqualification by Relationship.

An ordinary acknowledgment is usually held to be a ministerial act;⁵ and on this ground it is decided that it may be taken by one who is so related to the parties as to be disqualified as judge or juror.⁶ The current of authority, however, is very strongly to the effect that taking the separate acknowledgment of a married woman is a judicial act, or *quasi* judicial in its character.⁷

¹ *Hogans v. Carruth*, 19 Fla. 752; *Wilson v. Traer*, 20 Iowa, 233; *Beaman v. Whitney*, 29 Me. 413; *Stevens v. Hampton*, 46 Mo. 404; *Green v. Abraham*, 43 Ark. 420.

But a sheriff's deed, or tax deed, may be acknowledged before a court over which one of the grantees presides. *Lewis v. Curry*, 74 Mo. 49; *Mundee v. Freeman* (Fla.), 3 South. Repr. 153. Of course the grantor cannot take his own acknowledgment. *Groesbeck v. Seeley*, 13 Mich. 329; *Hammers v. Dole*, 61 Ill. 307; *Davis v. Beasley*, 75 Va. 491.

² *Sample v. Irwin*, 45 Tex. 567; *Nichols v. Hampton*, 46 Ga. 253. So, a trustee cannot take the acknowledgment of a deed to his wife in satisfaction of the trust. *Jones v. Porter*, 59 Miss. 628. An attorney for both parties is not disqualified. *Wardlaw v. Mayer*, 77 Ga. 620. A trust deed acknowledged before the trustee, if its execution be proved, is good between the parties to it, and those claiming under them. *Bennett v. Shipley*, 82 Mo. 448; *Siemers v. Kleburg*, 56 Mo. 196.

³ *Brown v. Moore*, 38 Tex. 645; *Darst v. Gale*, 83 Ill. 136; *contra*, *Bennett v. Shipley*, 82 Mo. 448.

⁴ *National Bank v. Conway*, 1 Hughes, C. C. 37; s. c. 14 Bank Reg. 513; *Stevens v. Hampton*, 46 Mo. 404; *Titus v. Johnson*, 50 Tex. 224; and see *Dussaume v. Burnett*, 5 Iowa, 95, as to an indirect interest.

⁵ *Hill v. Bacon*, 43 Ill. 477; *Learned v. Riley*, 14 Allen, 109; *Biscoe v. Byrd*, 15 Ark. 655; *Odiorne v. Mason*, 9 N. H. 24; *Schultz v. Moore*, 1 McLean, 520; *Kinsman v. Loomis*, 11 Ohio, 479; *Beaumont v. Yeatman*, 8 Humph. 543; *Hopkins v. Menderback*, 5 Johns. 234; *Truman v. Love*, 14 O. St. 531; *Nat'l. Bank v. Conway*, *supra*.

⁶ *Lynch v. Livingston*, 6 N. Y. 422; *Williamson v. Carskadden*, 36 O. St. 664; *Kimball v. Johnson*, 14 Wis. 674.

⁷ *Wright v. Player*, 72 N. C. 94; *Woodbourne v. Gorrell*, 66 N. C. 82; *Kerr v. Russell*, 69 Ill. 666; s. c. 18 Am. Rep. 634; *Lickmon v. Harding*,

§69. The Certificate of Acknowledgment.

In a majority of the states forms of certificates of acknowledgment are now prescribed by statute. The certificate is *prima facie* evidence of its genuineness and contents,¹ and of the execution of the instrument.² Whether a form be prescribed or not, the certificate should state the official character of the officer; the fact of the acknowledgment,³ and by whom made, using, substantially at least, the statutory language in stating these matters; the date and place when and where made; and should be signed by the officer, and attested by his official seal, if this latter be required.⁴ The certificate must show a compliance with the law by a specific statement of the facts constituting a valid acknowledgment; a general statement that the acknowledgment was made "according to law," or "in due form,"

65 Ill. 505; Williams v. Hobson, 6 O. St. 510; Hector v. Glasgow, 79 Pa. St. 79; Wharton on Ev. §1072; Wasson v. Conner, 54 Miss. 352; Williams v. Baker, 71 Pa. St. 476; Homeopathic Co. v. Marshall, 32 N. J. Eq. 103; Jamison v. Jamison, 3 Whart. 457; s. c. 31 Am. Dec. 536; Hornbeck v. Building Association, 88 Pa. St. 64; *contra*, Gill v. Fauntleroy, 8 B. Mon. 177; Kimball v. Johnson, 14 Wis. 674.

¹ Whart. on Ev. §1052; Tuten v. Gazan, 18 Fla. 751; Thurman v. Cameron, 24 Wend. 87, 92; People v. Snyder, 41 N. Y. 402; Tracy v. Jenks, 15 Pick. 468; Willink v. Miles, Pet. C. Ct. 429; Thompson v. Morgan, 6 Minn. 295; Keichline v. Keichline, 54 Pa. St. 76; Duff v. Wynkoop, 74 Pa. St. 300; Merrick v. Wallace, 19 Ill. 486; Fisher v. Meister, 24 Mich. 447.

² Young v. Duval, 109 U. S. 573; and see *ante*, §53.

³ Bryan v. Ramirez, 8 Cal. 461; s. c. 68 Am. Dec. 340. A certificate that the grantor appeared before the officer and signed, sealed and delivered the instrument, *held* not to show an acknowledgment. McDaniel v. Needham, 61 Tex. 269.

⁴ See Brunswick v. Brackett, 37 Minn. 58; s. c. 39 N. W. Repr. 214. The certificate should be liberally construed, and upheld if possible. Carpenter v. Dexter, 8 Wall. 513; Luffborough v. Parker, 12 Serg. & R. 48; Ralston v. Moore, 83 Ky. 571; Wells v. Atkinson, 24 Minn. 161; Kelly v. Calhoun, 95 U. S. 710.

Where the statute provided for acknowledgments to be taken in other states before the courts, and certified in the manner usual with such courts, *held*, that the act of Congress (1 U. S. Stat. at Large, p. 122) providing how records, etc., in each state shall be authenticated so as to take effect in every other state, did not operate on the certificate and record in such case. Calvert v. Fitzgerald, Little's Sel. Cases, 388.

will not suffice.¹ Where the statute authorizes acknowledgments to be taken in a foreign country before any court or mayor, and certified in the manner such acts are usually authenticated by them, the certificate, in such a case, is *prima facie* evidence of its conformity to the foreign law.² The certificate is in every instance *prima facie* proof of every matter contained therein which it is the duty of the officer to certify.³ The most marked exception in relation to certificates of acknowledgment is to be found in the law of North Carolina, which does not require, if the deed is probated within that state, that the certificate of acknowledgment or proof be written out and recorded with the instrument; a record otherwise duly made being there presumed to have been made on a proper probate.⁴ This seems also to have been the law at an early day in Kentucky and South Carolina.⁵

¹ Flanagan v. Young, 2 Har. & McH., 38; Gill v. Fauntleroy, 8 Mon. B. 177; Lucas v. Cobbs 1 Dev. & B. 228; Meddock v. Williams, 12 Ohio, 377; Wetmore v. Laird, 5 Biss. 160; Jones v. Lewis, 8 Ired. 70; s. c. 47 Am. Dec. 338; *contra*, Horton v. Hagler, 1 Hawks. 48.

Signing and acknowledging a deed in which a different person appears as the grantor, is not sufficient to convey title. Batchelor v. Breton, 112 U. S. 396; Warner v. Conn., 109 U. S. 357. Under the early Kentucky statute, the certificate must show that the grantor signed in the presence of the officer. Harris v. Price, 14 B. Mon. 333; Brown v. Swift (Ky.), 1 S. W. Repr. 474.

² Sessions v. Reynolds, 7 Sm. & M. (15 Miss.), 130. The acknowledgment in this case purported to be taken before the mayor of Liverpool, Eng., and to be under his official signature with the corporate seal, but was signed not by him, but by the town clerk, and it was presumed by the court that this was the usual mode of authentication in such cases.

³ Where the officer was required to certify the day and year of the acknowledgment, his certificate of the date was presumed correct, although the deed bore a later date. Cover v. Manaway, 115 Pa. St. 338; s. c. 2 Am. St. Rep. 552.

⁴ Love v. Harben, 87 N. C. 253; Starke v. Etheridge, 71 N. C. 240; Battle's Revision, ch. 35.

⁵ Hillegas v. Hartley, 1 Hill Ch. 106; Lamar v. Raysor, 7 Rich. 509; Wood v. Reeves, 23 S. C. 382.

§70. Caption and Locality.

Usually the caption of the certificate names the state and county in which the officer acts in taking the acknowledgment. If the title and official character of the officer be fully stated in the body of the certificate, or in connection with the signature, the omission to name the state and county in the caption is immaterial, as the presumption obtains that the officer acted within his jurisdiction.¹ Where, however, the officer in stating his title has described himself as a notary or clerk "*of said county*," referring to the caption, and the caption fails to give the county or state, such defect has been held fatal;² while in other cases, evidence has been held admissible to supply the omission and show the county.³ Where the acknowledgment was made in the county where the court was sitting, judicial notice was taken that the certifying officer was a justice of that county.⁴ In other cases resort has been had to the

¹ *Ante*, §63, and notes. *Wright v. Wilson*, 17 Mich. 192; *Oney v. Clendenin*, 28 W. Va. 34; *Blythe v. Houston*, 46 Tex. 67; *Brown v. Faran*, 3 Ohio, 140.

"State of Missouri, Schuyler Co., ss. Before me the undersigned circuit clerk comes L. H. C.," etc., held sufficient to show that the officer was clerk of the Circuit Court of Schuyler county. *Sidwell v. Burney*, 69 Mo. 144; and to same effect *Livingston v. Kettelle*, 1 Gilm.; s. c. 41 Am. Dec. 166. It was held, the deed being 30 years old, that it was no objection that the certificate did not name the state. *Robidoux v. Casilegi*, 10 Mo. App. 516.

² *Willard v. Cramer*, 39 Iowa. 22. The certificate must be entitled of some assignable locality, and "Lincoln, ss. Wiscasset," is not enough. *Vance v. Schuyler*, 1 Gilm. 160; *Hardin v. Kirk*, 49 Ill. 153; s. c. 95 Am. Dec. 519.

³ *Scott v. Gallagher*, 11 Serg. & R. 347; s. c. 16 Am. Dec. 508; *Dunlap v. Dougherty*, 20 Ill. 397; *Graham v. Anderson*, 42 Ill. 514; s. c. 92 Am. Dec. 89; *Connelly v. Bowie*, 6 Har. & J., 141.

Where a justice of the peace of C. county took the acknowledgment, and because of using a printed form of blank for another county, the certificate read "Erie Co. ss. Before the subscriber, a justice of the peace of *said county*," etc., the mistake was held immaterial, and parol evidence was admitted to show it. *Angier v. Schieffelin*, 72 Pa. St. 106; s. c. 13 Am. Rep. 659.

⁴ *Irving v. Brownell*, 11 Ill. 402; *Graham v. Anderson*, 42 Ill. 514; s. c. 92 Am. Dec. 89; *Livingston v. Kettelle*, 1 Gilm. 116; 41 Am. Dec. 166.

seal to ascertain the county,¹ and to the deed,² and to the accompanying certificate of magistracy and conformity.³

§71. Official Capacity Must Appear.

The certificate should show that the person taking the acknowledgment is an officer who is by law authorized to do so.⁴ This may be sufficiently shown in connection with the signature,⁵ and where the acknowledgment was taken in another state, it has been held as sufficiently shown by the accompanying certificate of magistracy.⁶ The rule stated is not universal. Thus, in Maryland, it is held that as the statute does not require it, the official character of the officer need not be stated;⁷ and in Pennsylvania evidence

¹ *Chiniquy v. Catholic Bishop*, 41 Ill. 148. But reference to the name of the county on a notary's seal was denied in *Willard v. Cramer*, 39 Iowa, 22.

² *Carpenter v. Dexter*, 8 Wall. 513; *Brooks v. Chaplin*, 3 Vt. 281; s. c. 23 Am. Dec. 209; *Doe ex dem. Truluck v. Roe*, 1 Ga. 3; *Furhman v. Loudon*, 13 Serg. & R. 386; s. c. 15 Am. Dec. 608; *Bennett v. Paine*, 7 Watts, 334; s. c. 32 Am. Dec. 765; *Pierce v. Hokes*, 11 Harris, 231.

³ *Adams v. Medsker*, 25 W. Va. 128; *Hardin v. Osborne*, 60 Ill. 93; qualifying *Hardin v. Kirk*, 49 Ill. 153. Two certificates by the same officer, on the same deed, may, as to caption, be treated as one. *Wright v. Wilson*, 17 Mich. 192; *McDonald v. Morgan*, 27 Tex. 504; *Manly v. Culver*, 20 Tex. 144.

⁴ *Fogg v. Holcomb*, 64 Iowa, 621; s. c. 21 N. W. Repr. 111; *Patton v. Brown*, 1 Cooke, 119; *Johnston v. Haines*, 2 Ohio, 55; s. c. 15 Am. Dec. 533; *Cassell v. Cooke*, 8 Serg. & R. 268; s. c. 11 Am. Dec. 610; *Trustees v. McKechnie*, 90 N. Y. 618; *Lincoln v. Thompson*, 75 Mo. 613; *Belo v. Mayer*, 79 Mo. 67; *Greenwood v. Jenswold*, 69 Iowa, 52; s. c. 28 N. W. Repr. 433; *Myers v. Boyd*, 96 Pa. St. 427.

⁵ *McDonald v. Morgan*, 27 Tex. 504; *Russ v. Wingate*, 30 Miss. 440; *Duval v. Covenhoven*, 4 Wend. 561; *Goodyear v. Hullihen*, 2 Hughes (U. S.), 492.

If the caption state the county, and the certificate is signed by one as justice of the peace, it will be presumed that he is a justice of that county. *Wright v. Wilson*, 17 Mich. 192.

⁶ *Final v. Backus*, 18 Mich. 218; *Adams v. Medsker*, 25 W. Va. 128; *Hardin v. Osborne*, 60 Ill. 93. But the proper place is in the body of the certificate. *Colby v. McOmber*, 71 Iowa, 469; s. c. 32 N. W. Repr. 459.

⁷ *Van Ness v. U. S. Bank*, 13 Pet. 17; *Schultz v. Moore*, 1 McLean, 520; *Bank of U. S. v. Benning*, 4 Cranch C. Ct. 81. For the certificate of official character now required by §3, art. 24, Code of Maryland, see *Sitler v. McComas*, 66 Md. 135; s. c. 6 At. Repr. 527; *Dyson v. Simmons*, 48 Md. 207.

aliunde has been admitted to supply the omission and show the officer's authority.¹ The general rule, however, not only requires that the official character of the officer shall appear in the certificate, but also denies that an omission in this respect can be supplied by parol evidence. A record that does not affirmatively show upon its face to be valid, will not charge constructive notice.²

§72. **Initial Letters and Abbreviations** may be used in the certificate, and in connection with the signature, to designate the official character of the officer taking the acknowledgment. Thus, where the affidavit of proof of a deed was headed "Republic of Texas—Liberty County," it was held that the letters "R. L. C.," following the signature, sufficiently showed the proof to have been made before the recorder of Liberty county.³ Any letters having a well known and fixed import may be used; thus, "J. P." will

¹ *Bennett v. Paine*, 7 Watts, 334; s. c. 32 Am. Dec. 765; *Scott v. Gallagher*, 14 Serg. & R. 333; s. c. 16 Am. Dec. 508; also *Byer v. Entyre*, 2 Gilm. (Ill.), 150; s. c. 41 Am. Dec. 410; *Connelly v. Bowie*, 6 Har. & J. 141. These cases are not in harmony with the established construction of the registry laws and the doctrine of constructive notice. The admission of such evidence is, of course, on the theory that without it the certificate is deficient. How, then, can the defective record be held to have imparted constructive notice without giving to such parol evidence a retroactive effect? And how can such evidence, given in a suit properly aid the defective record in the register's office to impart notice thereafter?

Where the certificate did not show the county, but that fact clearly appeared by reference to the deed, it was sustained. *Oney v. Clendenin*, 28 W. Va. 34; *Merchant's Bank v. Harrison*, 39 Mo. 433; s. c. 93 Am. Dec. 285; but where it showed neither the state nor the county or city where made, it was held defective. *Greenwood v. Jenswold*, 69 Iowa, 53; s. c. 28 N. W. Repr. 433. The certificate should state of what county the officer is an officer. *Crawford v. Burton*, 6 Iowa, 476.

² Parol evidence will not be admitted to show the official character of the officer taking the acknowledgment. *Coffey v. Hendricks*, 66 Tex. 676; s. c. 2 S. W. Repr. 47; *Holladay v. Cromwell*, 26 Tex. 189; *People v. Register of N. Y.*, 6 Abb. 180. See *Ennor v. Thompson*, 46 Ill. 214; *Sewall v. Haymaker*, 127 U. S. 719; *Smith v. Allis*, 52 Wis. 337; *Bank v. Paul*, 75 Va. 594; s. c. 40 Am. Rep. 740; *post*, §87.

³ *McDonald v. Morgan*, 27 Tex. 504.

suffice for justice of the peace,¹ and "N. P." for notary public.²

§73. Using Official Seal.

If the statute requires an officer to use an official seal in certifying acknowledgments, a failure to attach it renders the certificate invalid, and the record of the instrument will not impart constructive notice.³ But unless the statute specifically requires its use, it is held that a seal is not necessary;⁴ and the rule has been applied to notaries public who, at common law, were required to authenticate all their official acts with their seal of office.⁵ There is some contrariety of decision as to what is sufficient to constitute an official seal, and especially a notarial seal. A scrawl will

¹ *Russ v. Wingate*, 30 Miss. 440; *Final v. Backus*, 18 Mich. 218; *Shattuck v. The People*, 4 Scam. 477.

² *Rawley v. Berrian*, 12 Ill. 198; *Stinson v. Russell*, 2 Tenn. 40; *Blythe v. Houston*, 46 Tex. 67, 79. In this last case, the only designation of official character consisted of the words "Notary Public N. O." following the signature. The caption was, "The State of Texas, Hopkins county." The mistake was held immaterial, and the designation sufficient. And see, *Merchant's Bank v. Harrison*, 39 Mo. 433.

³ *King v. Russell*, 40 Tex. 124, 130; *Meskimen v. Day*, 35 Kan. 46; s. c. 10 Pac. Repr. 14; *Mason v. Brock*, 12 Ill. 273; s. c. 52 Am. Dec. 490; *Hastings v. Vaughan*, 5 Cal. 315; *McKellar v. Peck*, 39 Tex. 381; *Baze v. Arper*, 6 Minn. 220; *Little v. Dodge*, 32 Ark. 453; *Talcot v. Del. Ins. Co.*, 2 Wash. 449; *Tunis v. Withrow*, 77 Am. Dec. 717; *Thompson v. Scheid* (Minn.), 38 N. W. Repr. 801; *Tex. Land Co. v. Williams*, 51 Tex. 51; *Miller v. Henshaw*, 4 Dana, 325; *Barney v. Sutton*, 2 Watts, 31; *Buell v. Irwin*, 24 Mich. 145; *Dail v. Moore*, 51 Mo. 589; *Richards v. Randolph*, 5 Mason, 115.

⁴ *Baze v. Arper*, 6 Minn. 220, 264; *Maxwell v. Hartman*, 50 Wis. 660; *Farnum v. Buffum*, 4 Cush. 260; *Harrison v. Simmons*, 55 Ala. 510; *Jacques v. Weeks*, 7 Watts, 261; *Powers v. Bryant*, 7 Port. 9; *Cole v. Wright*, 70 Ind. 179.

⁵ *Farnum v. Buffum*, *supra*; *Booth v. Cook*, 20 Ill. 129; *Nichols v. Hampton*, 46 Ga. 253. The Ohio statute in reference to notaries required them to have seals, and to authenticate their official acts therewith. Afterwards, notaries were by statute named among the officers authorized to take acknowledgments, but it was not specifically required that a seal should be used in taking acknowledgments. *Held*, that an acknowledgment taken by a notary was valid without his seal. *Fund Commissioners v. Glass*, 17 Ohio, 542, quoted at length in *Devlin on Deeds*, §490, note; and see also, *Muncie v. Brown*, 112 Ind. 474; s. c. 14 N. E. Repr. 358; 12 West. Repr. 157. In *McKellar v. Peck*, 39 Tex. 381, a certificate of acknowledgment by a notary public was held in-

not answer,¹ unless its use be permitted by statute until a seal can be provided.² At common law a seal was an impression on wax, but an impression on paper alone is now held sufficient;³ and so, *an impression in ink*, in the form of a notarial seal, and stamped on the paper, has been held to answer the requirement.⁴ If the statute prescribe the form of the seal, it should be followed; yet the Nebraska statute in relation to engraving the name of the notary on the seal, is held to be permissive only;⁵ and in Alabama, where the statute provided that the seal should bear the arms of the state, but failed to state what should be the arms of the state, the requirement was disregarded.⁶ It has been held that the name of the notary must be engraved on the seal,⁷ and also that it must show on its face to be the seal of a notary;⁸ but where the statute does not prescribe the form, the better opinion is that the notary may adopt a seal with such an inscription as he may choose, and if it be capable of making a definite and uniform impression on paper, it will be sufficient.⁹

valid for want of a notarial seal, the court putting the decision on the ground that the statute (Pas. Dig. 4684) required (as did that of Ohio) that all *notarial* acts should be under seal. And see *Meskimen v. Day*, 35 Kan. 46.

¹ *Mason v. Brock*, 12 Ill. 273; s. c. 52 Am. Dec. 490; *Dunn v. Adams*, 1 Ala. 527.

² *Fogarty v. Sawyer*, 23 Cal. 570; *Collins v. Boyd*, 5 Dana, 316.

³ *Pillow v. Roberts*, 13 How. (U. S.), 472; *Mason v. Brock*, *supra*.

⁴ *The Gallego*, 30 Fed. Repr. 271.

⁵ *Village v. Reed*, 21 Neb. 261; s. c. 31 N. W. Repr. 797.

⁶ *Kirksey v. Bates*, 7 Port. 529; s. c. 31 Am. Dec. 722. So, in Arkansas, the absence from the seal of the emblems and devices required by the statute, does not invalidate the certificate. *Sonfield v. Thompson*, 42 Ark. 46. The use by one notary of another's seal, the seal being without name, but having a different design, does not vitiate. *Muncie v. Brown*, 112 Ind. 474.

⁷ *Gage v. Dubuque*, 11 Iowa, 310, 314. But see *Philipps*, *In re.*, 14 Nat. Bank Reg. 219.

⁸ *Nebe*, *In re.*, 11 Nat. Bank Reg. 289.

⁹ *Mason v. Brock*, *supra*; *Orr v. Lacy*, 4 McLean, 243; *Bump on Bank'cy* (10 ed.), 86; *Devlin on Deeds*, §495. In Texas, seals were not required to have thereon a star with five points, prior to 1868. *Davis v. Roosevelt*, 53 Tex. 305. And see *Sparrow v. Hovey*, 41 Mich. 708; *Pierce v. Indseth*, 16 Otto (106 U. S.), 546.

§74. Seal to be Shown How.

Where the seal is in fact attached, a reference to it, in the certificate, as being the officer's seal, and as having been attached by him, is usually held unnecessary;¹ but on the ground that nothing should be presumed in favor of the certificate, it has elsewhere been held that the officer must certify that what purports to be his seal, is his official seal; and where the certificate read "witness my hand and seal," instead of "notarial seal," and only a certified copy of the instrument, showing a scrawl in the place where the seal is usually affixed, was before the court, the certificate was adjudged insufficient.² In recording, a scrawl may be used to indicate the seal, a *fac simile* of the seal or device not being absolutely necessary;³ and where the certificate read "witness my hand

¹ Harrington v. Fish, 10 Mich. 415; Coffey v. Hendricks, 66 Tex. 676. In Webb v. Huff, 61 Tex. 677, the entire omission of the clause, "Given under my hand and seal of office," though contained in the statutory form, was held immaterial, the court saying that while no doubt these venerable words ought to be used by all notaries, yet it could add nothing to the seal and signature to say "this is my seal and this my signature," or other equivalent words. So, the omission of the word "seal" from the expression above, held not bad. Nichols v. Stewart, 15 Tex. 225.

² Wetmore v. Laird, 5 Biss. 160. *Contra*, as to same expression in the certificate, the certified copy not even showing the scrawl. Ballard v. Perry, 28 Tex. 347, 364. See, however, Switzer v. Knapps, 10 Iowa, 72; s. c. 74 Am. Dec. 375.

³ I. C. Ry. Co. v. Johnson, 40 Ill. 35.

Where the deed is offered in evidence, proof may, it seems, be admitted to show that the wrong seal was affixed by mistake. Peck v. McKellar, 33 Tex. 234; but not so as to give the record the effect of notice. King v. Russell, 40 Tex. 124.

Where the recorder took the acknowledgment and immediately following his certificate of acknowledgment, and on the same sheet, was his certificate of record, with his seal to the latter only, the two certificates were treated as one, and the seal held applicable to both. Manly v. Culver, 20 Tex. 143. And see Wright v. Wilson, 17 Mich. 192.

Courts take notice of the seals of notaries public. Stoddard v. Sloan, 65 Iowa, 680; s. c. 22 N. W. Repr. 924; Yeaton v. Fry, 5 Cranch, 535; Porter v. Judson, 1 Gray, 175; and of commissioners of deeds appointed for other states. Smith v. Van Gilder, 26 Ark. 527; Irving v. Brownell, 11 Gilm. 402; Hultz v. Ackley, 63 Pa. St. 142.

General evidence by a notary that he never affixed his seal to an instrument purporting to have been signed and sealed by him, will not re-

and official seal," it was held immaterial that a certified copy, offered in evidence, did not show even a scrawl to indicate a seal on the original.¹

§75. Certificates of Magistracy and Conformity.

Usually the statutes require that where the acknowledgment is taken in another state, and especially if taken by an inferior officer, or in accordance with the laws of the state where taken, it shall be accompanied by a further certificate of some officer of a court of record under seal to the effect that the officer taking the acknowledgment is such officer as he purports to be, that his signature is genuine and his certificate in proper form.² In cases where

but the presumption in favor of the deed. *Wright v. Bundy*, 11 Ind. 398. See *Stone v. Montgomery*, 35 Miss. 83, and compare *Garth v. Fort*, 15 Lea (Tenn.). 683.

¹ *Ballard v. Perry*, *supra*; *Hammond v. Gordon*, 93 Mo. 223; s. c. 6 S. W. Repr. 93. In *Geary v. City of Kansas*, 61 Mo. 378, it is held that in recording, it is not necessary for the recorder to indicate in any manner that a seal was attached to the instrument. It is enough that it appear from the recitals of the record, that the instrument copied is under seal. *Smith v. Dall*, 13 Cal. 510. And see also, to same effect, *Jones v. Martin*, 16 Cal. 166; *Hedden v. Overton*, 4 Bibb. 406; *Griffin v. Sheffield*, 38 Miss. 359; s. c. 77 Am. Dec. 646; *Sneed v. Ward*, 5 Dana. 187; *Coffey v. Hendricks*, 66 Tex. 676; s. c. 2 S. W. Repr. 47; *Gale v. Shillock* (Dak.), 29 N. W. Repr. 661. *Contra*, if the record does not show a copy of the seal, as such copies are usually made in records, the presumption is that there was no seal to the original. *Switzer v. Knapps*, 10 Iowa, 72; s. c. 74 Am. Dec. 375; *Talcot v. Delaware*, 2 Wash. 449; *Todd v. Union Dime Sav. Inst.*, 20 Abb. N. Cas. 270.

Where the statute authorizes acknowledgments to be taken by the clerk of a court of record, the use of his official seal by a county clerk does not, of itself, suffice to show his court to be a court of record, there being no recital to that effect in the certificate. *Fogg v. Holcombe*, 64 Iowa, 621; s. c. 21 N. W. Repr. 111.

² See *Stimson's Am. Stat. Law*, §1583. Scarcely any two statutes correspond as to when the double certificate is required, by whom it is to be made, or what is to be certified in it. In all cases, however, the second certificate must certify to the official character of the officer taking the acknowledgment; usually also to his seal and the genuineness of his signature; and in some cases that he is authorized by the law of his own state to take acknowledgments, and that his certificate thereof is in due form. Some of the statutes provide that the official character of justices of the peace shall be certified by the "proper authority," or the "proper clerk" (*Rev. C. of Iowa* (1873), §1956), and it has been held that the proper clerk in such case is the one in whose office the

the statute requires this double certificate, the record of an instrument without it will not impart constructive notice.¹ If, however, such certificate be subsequently obtained and recorded, the deed will be treated as recorded from the date of filing this certificate.² These certificates may often be looked to in supplying defects of venue, of statement of official character and the like in the certificate of acknowledgment;³ and like it, are to receive a liberal construction.⁴

evidence of the official character of justices of the peace is kept. *Grand Tower Co. v. Gill*, 111 Ill. 541.

It seems that an acknowledgment taken according to the laws of another state has been held good in Illinois without a certificate of conformity. *Edward v. Flannagan*, 104 U. S. 562; though such certificate is required as to foreign acknowledgments. *Hurd's Rev. Stats. of Ill.* (1882), ch. 30, §22.

¹ *Musgrove v. Bosner*, 5 Or. 313; s. c. 20 Am. Rep. 737; *O'Brien v. Gaslin*, 20 Neb. 347; s. c. 30 N. W. Repr. 274; *Tex. Land Co. v. Williams*, 51 Tex. 51; *Ely v. Wilcox*, 20 Wis. 551; s. c. 91 Am. Dec. 436; *Sidler v. McComas*, 66 Md. 135; s. c. 6 Atl. Repr. 527; *Irwin v. Welch*, 10 Neb. 479; *Strong v. Smith*, 3 McLean, 362; *Dyson v. Simmons*, 48 Md. 207; *De Segond v. Culver*, 10 Ohio, 188; *Morton v. Smith*, 2 Dill. 316; *Milligan v. Mayne*, 2 Cr. C. Ct. 210; *Jones v. Berkshire*, 15 Iowa, 248; s. c. 83 Am. Dec. 412; *Fleschner v. Sumpter*, 12 Or. 161; s. c. 6 Pac. Repr. 506.

² *Reasoner v. Edmundson*, 5 Ind. 393; *Ely v. Wilcox*, 20 Wis. 523; s. c. 91 Am. Dec. 436.

³ *Hardin v. Osborne*, 60 Ill. 93.

⁴ Thus the statute required the certifying officer to state that he *knew* the signature of the officer who took the acknowledgment to be genuine, and his certificate stating simply that it *was* genuine, held sufficient. *Wells v. Atkinson*, 24 Minn. 161.

But a double certificate stating that the acknowledging officer was a justice of the peace was held bad for not stating he was such at the time the acknowledgment was taken. *Phillips v. People*, 11 Ill. App. 340.

Where the certificate of conformity was given some years after the acknowledgment was taken, and certified that the acknowledgment was taken according to "existing law," it was sustained, and the word "existing" referred to the date of the acknowledgment. *Harrington v. Fish*, 10 Mich. 415.

A certificate of magistracy given by an officer not authorized to make it, is of no avail. *Sartor v. Bolinger*, 59 Tex. 411. See *De Segond v. Culver*, 10 Ohio, 188. Where the judge is his own clerk, he may certify to his attestation. *Moore v. Hill*, 59 Ga. 760.

§76. Identity of Grantor.

A majority of the statutes require the certificate to show that the party acknowledging the instrument was known or proved to the officer to be the person who executed it.¹ This is deemed to be a matter of substance and an important safeguard against fraud; and a failure to comply with the requirement vitiates the certificate.² A statement that the officer is satisfied that the person acknowledging is the

¹ Schley v. Pull. Car Co., 120 U. S. 575; Livingston v. Kettelle, 1 Gilm. 116; s. c. 41 Am. Dec. 166; Smith v. Garden, 28 Wis. 685.

For statutes and forms not requiring the party to be certified as known to the officer, see Kelley's Rev. Stats. of W. Va. (1878), ch. 65, §3; Rev. Stats. of Ind. (1881), 2947; Rev. Code of Md. (1878), art. 44, §78; Code of Va. (1873), ch. 117, §3; Rev. Stats. of Wis. (1878), §2217; Code of Miss. (1880), §1218, and statutes of Rhode Island, Wyoming, Kentucky, New Hampshire, North Carolina, Ohio, South Carolina, Maine, Pennsylvania and Vermont, cited in the last chapter of this work; also Stimson's Am. Stat. Law, §1579. In Alabama a certificate, on this point, recites simply that the party "is known to me." Code of 1876, §2158.

² Schley v. Pull. Car Co., 120 U. S. 575; Morgan v. Curtenius, 4 McLean, 366; Rogers v. Adams, 66 Ala. 600; Callaway v. Fash, 50 Mo. 420; Wolf v. Fogarty, 6 Cal. 224; s. c. 65 Am. Dec. 509; Coburn v. Herrington, 114 Ill. 104; Reynolds v. Kingsbury, 15 Iowa, 238; Hayden v. Wescott, 11 Conn. 129; Pinckney v. Burrage, 31 N. J. L. 21; Garnet v. Stockton, 7 Humph. (Tenn.), 84; Gage v. Wheeler (Ill.), 21 N. E. Repr. 1075; Smith v. Garden, 28 Wis. 685. In this last case the court would not presume, as against the requirement of the statute, that Judge Cranch, of the U. S. Circuit Court, who took the acknowledgment in Washington City in 1842, was acquainted with Daniel Webster, the grantor.

In Hiles v. La Flesh, 59 Wis. 465; s. c. 18 N. W. Rep. 435, this point was again before the Wisconsin court. The statute provided that the certificate of acknowledgment should be substantially in the form prescribed. The statutory form (Rev. Stats., §2217) contained these as the words of identity—"to me known to be the person who executed the foregoing instrument." The certificate did not contain any of these words of identity and yet it was upheld. The deed was executed by the county clerk, and the notary who took the acknowledgment was also a subscribing witness to the deed, and in stating the name of the grantor in the certificate, he designated him as the county clerk—*ergo*, he certainly must have known him to be the person who executed the deed. The case is, by the court, ingeniously distinguished from that of Smith v. Garden, on the ground that the later statute provided that a *substantial* compliance with the prescribed form should be sufficient. This has always been the rule—but the decision is not a bad one, because it cannot be reconciled with the earlier case.

grantor, will not suffice;¹ nor will the statement that the deed was signed in the officer's presence.² It has been held that a mere introduction at the time is not sufficient to authorize the officer to certify that the party is known to him to be the person named in the deed;³ but the better reason and authority is to the effect that if the officer's knowledge of the party, however it may have been acquired, is sufficient to satisfy his conscience, it will answer the requirement of the law.⁴

§77. The Words of Identity.

The requirement that the person acknowledging or proving the instrument shall be certified as known to the officer, is by the several statutes expressed in a variety of terms, and numerous cases have arisen construing expressions held or claimed to be of equivalent import to the words of the statute.⁵ It has been argued with much ingenuity that if the officer certify the name of the party and describe him as the person who executed the deed, or as the grantor in the foregoing instrument, this is sufficient, since

¹ Shephard v. Carriel, 19 Ill. 313; Fryer v. Rockefeller, 63 N. Y. 268; Kimball v. Semple, 25 Cal. 440. Compare Hiles v. La Flesh, 59 Wis. 465. This manner of certifying identity is authorized in New Jersey. Statutes (1877), *Conveyances*, §§4-13; Pinckney v. Burrage, 31 N. J. L. 21.

² Rogers v. Adams, 66 Ala. 600; but see Carpenter v. Dexter, 8 Wall. 513.

³ Jones v. Bach, 48 Barb. 568; Treadwell v. Sackett, 50 Barb. 440.

⁴ Wood v. Bach, 54 Barb. 134; Nippel v. Hammond, 4 Colo. 211, construing §14, p. 109, Rev. Stats. of Colo.

It is held in some states that a sheriff's deed does not require the words of identity. Odgen v. Walters, 12 Kan. 282; Lamorque v. Langlais, 8 Mo. 328; and in Tennessee that the officer need not certify that a married woman is known to him. Bell v. Lyle, 10 Lea, 44; and see Mullins v. Weaver, 61 Tex. 5. *Contra*, Lindley v. Smith, 46 Ill. 523, with dissenting opinion by Ch. J. Breese; and in Florida that the requirement as to identity applies only to acknowledgments taken out of the state. McCoy v. Bailey, 21 Fla. 803.

⁵ Schley v. Pullman Car Co., 120 U. S. 575. "Personally known," held equivalent to "personally acquainted with." Kelley v. Calhoun, 95 U. S. 710. The omission of "known," held fatal. Wolf v. Fogarty, 6 Cal. 224; s. c. 65 Am. Dec. 509; Tully v. Davis, 30 Ill. 103; s. c. 83 Am. Dec. 179.

he could not properly certify in this manner unless the person was thus known to him, and hence that this is tantamount to saying that he was thus known. This construction, however, has not prevailed;¹ but any independent, affirmative statement that the party was known to the officer as the grantor, however worded, has usually been held sufficient.² Several of the statutes require that the grantor shall be "personally known," but the omission of the word "personally" is held immaterial, since, where one appears before an officer, and is known to him, he is necessarily known personally.³ Where the statute required the proof of identity to be indorsed on the deed, a failure to so indorse it, has been held not to vitiate the record.⁴

¹ Fryer v. Rockafeller, 63 N. Y. 268; Brenton v. Seever, 12 Iowa, 389. But see Hiles v. LaFlesh, 69 Wis. 765.

² Where the statutory expression was "well known to me to be the person whose name is subscribed to the foregoing instrument," the phrase "to me well known," omitting the remainder, was held sufficient. Watkins v. Hall, 57 Tex. 1; Jackson v. Gumaer, 2 Cow. 552; Little v. Weatherford, 63 Tex. 638.

"Who I am satisfied are the grantors in the within conveyance," held sufficient. Culbertson v. Witbeck Co., 127 U. S. 326; s. c. 8 Sup. Ct. Repr. 1136. For further illustrations, see Kelley v. Calhoun, 95 U. S. 710; Livingston v. Kettelle, 1 Gilm. 116; s. c. 41 Am. Dec. 166, with full notes; Northrop v. Wright, 7 Hill, 476; Mount v. Kesterson, 6 Coldw. 452; Hornbeck v. Mut. Build. Ass'n, 88 Pa. St. 64; Jackson v. Osborn, 2 Wend. 555; s. c. 20 Am. Dec. 649; Hunt v. Johnson, 19 N. Y. 279.

³ Sheldon v. Stryker, 42 Barb. 284; West Point Co. v. Reymert, 45 N. Y. 703; Rosenthal v. Griffin, 23 Iowa, 263; Davis v. Bogle, 11 Heisk. 315; Hopkins v. Delaney, 8 Cal. 85; Alexander v. Merry, 9 Mo. 514; Warner v. Hardy, 6 Md. 525; Hunt v. Johnson, 19 N. Y. 279; Carpenter v. Dexter, 8 Wall. 513. But see Gould v. Woodward, 4 Greene, G., 82.

⁴ Sowers v. Peterson, 59 Tex. 216.

Where the officer certified the grantor was known, and the deed proved a forgery, held the officer was not liable on his official bond under a statute providing that "any officer who knowingly misstates any material fact," in such certificate, "shall be liable for all damages caused thereby." The purchaser's loss was not the proximate result of the officer's act. Wylles v. Haun, 47 Iowa, 614; and see also, Crews v. Taylor, 56 Tex. 461; Oakland v. Murphy, 9 Pac. Repr. 483. Compare Fogarty v. Finley, 10 Cal. 239; s. c. 70 Am. Dec. 714. In tracing titles identity of names is *prima facie* sufficient. Ward v. Dougherty, 75 Cal. 240.

§78. Stating Grantor's Name.

The better practice is to state the grantor's name in the certificate, but this is not absolutely necessary if it is made to appear therefrom with reasonable certainty that the grantor in fact acknowledged the instrument.¹ A designation of the party as "the grantor in the foregoing instrument," or as the person who executed it, is held sufficient to aid a defective statement of the name,² or to supply its omission.³ Where the name stated in the certificate is a different name from that signed to the deed, the acknowledgment is not good;⁴ but slight discrepancies in this respect are usually held immaterial.⁵

¹ Sanford v. Bulkley, 30 Conn. 344; Lincoln v. Thompson, 75 Mo. 613; Wise v. Postlewait, 3 W. Va. 452; Lane v. Shields, 3 Yerg. 405; Magness v. Arnold, 31 Ark. 103; Chandler v. Spear, 22 Vt. 388; Wilcoxon v. Osborn, 77 Mo. 621. (So, where the instrument was acknowledged before a court. Phillips v. Ruble, Litt. Sel. Cas. 221). *Contra*, Hayden v. Wescott, 11 Conn. 129; Smith's Lessee v. Hunt, 13 Ohio, 260; s. c. 42 Am. Dec. 201.

² Where the christian name was omitted, and the party was not referred to as the grantor in the deed, the certificate was held bad. Hiss v. McCabe, 45 Md. 77.

Where the certificate recited that Oliver Hale, Daniel Brown and Richard G. personally appeared "and acknowledged this instrument *by them sealed and subscribed*," etc., it was held that although the surname of the third grantor was omitted, yet it appeared with sufficient certainty that he acknowledged the deed. Chandler v. Spear, 22 Vt. 388. Under the rule in Shaw v. Poor, 6 Pick. 86; s. c. 17 Am. Dec. 347, the acknowledgment of the third grantor could usually be discharged as surplusage. See *ante*, §55.

³ Sanford v. Bulkley, 30 Conn. 344, and cases in note 1, *supra*.

⁴ The acknowledgment by Harmon Sherman of a deed signed by *Hiram* Sherman was held bad, but the court say: "If there had been proof in this case that Hiram S. was also known by the name of Harmon S., we are not prepared to say it would not have laid a foundation for introducing the record." Boothroyd v. Engles, 23 Mich. 19. Mitchell Allen and Michael Allaine have been presumed by the court to be the same person. Chiniquy v. Catholic Bishop, 41 Ill. 148. But Geo. H. Crane will not answer for Geo. H. Case who signs the deed. Heil v. Redden, 38 Kan. 255; s. c. 16 Pac. Repr. 747; nor will McKinnie suffice for McKewin, and evidence to show they are the same person held not admissible. Jones v. Parks, 22 Ala. 446.

⁵ Where the mortgagee's name was by mistake written in the blank for the mortgagor, and the latter's name in the blank for the mortgagee, but the instrument was signed by the proper party, and purported to secure a debt from the party who signed, to the other, and was properly

§79. Substantial Compliance with Statute Sufficient.

A certificate, though not in the exact language prescribed by the statute, will be sufficient if it is in substantial compliance therewith and fairly shows the several things to have been done which the law requires.¹ The policy of the law favors registration and will not suffer its purpose and effect to be defeated on account of immaterial omissions, patent mistakes and inartificial expressions in the certificate.² As a rule the courts have given a liberal construction to the ordinary certificate of acknowledgment,³ and have permitted the omission of entire phrases of a formal character, although contained in the specific form prescribed

acknowledged by the one who signed its record, was held to charge the proper notice despite the mistake. *Beaver v. Slanker*, 94 Ill. 175. But see *Wood v. Cochrane*, 39 Vt. 544. An obvious clerical error in stating the name will not vitiate. *Brunswick v. Brackett*, 37 Minn. 58.

The law knows but one christian name, and the omission or insertion of a middle name is immaterial. *Jame v. Stiles*, 14 Pet. 322; *Schofield v. Jennings*, 68 Ind. 232; *Page v. Arnim*, 29 Tex. 53; and as to identify of names, see cases cited in note 2, p. 108, *ante*; and *Stebbins v. Duncan*, 108 U. S. 32; *Gitt v. Watson*, 18 Mo. 274; *Bogue v. Bigelow*, 29 Vt. 179; *Fallon v. Kehoe*, 38 Cal. 44; s. c. 99 Am. Dec. 347; *Crosby v. Vleet*, 3 N. J. L. 86.

¹ *Sharpe v. Orme*, 61 Ala. 263; *Morse v. Clayton*, 21 Miss. 373; *Stewart v. Dutton*, 39 Ill. 91; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Davar v. Cardwell*, 27 Ind. 478; *Wells v. Atkinson*, 24 Minn. 161; *Hartshorn v. Dawson*, 79 Ill. 108; *Barton v. Morris*, 15 Ohio 408; *Werner v. Hardy*, 6 Md. 525; *Combs v. Thomas*, 57 Tex. 321; *Talbot v. Simpson*, Peters, C. C. 188; *Johnson v. Badger, etc., Co.*, 13 Nev. 351.

² *Belcher v. Weaver*, 46 Tex. 294; s. c. 26 Am. Rep. 267; *Halls v. Thomson*, 1 Smedes & M. 443; *Muir v. Gallaway*, 61 Cal. 498; *Hollingsworth v. McDonald*, 2 Har. & J. 230; *Tiffany v. Glover*, 3 Greene, G., 587; *Owen v. Norris*, 5 Blackf. 479; *Sheldon v. Stryker*, 42 Barb. 284; *Dorn v. Best*, 15 Tex. 62; *McIntire v. Ward*, 5 Binn. 296; *Wise v. Postlewait*, 3 W. V. 452; *Harrington v. Fish*, 10 Mich. 415; *Brunswick v. Brackett*, 37 Minn. 54; s. c. 33 N. W. Repr. 214.

³ "Instruments like this," said Judge Swayne, in *Kelly v. Calhoun*, 95 U. S. 710, "should be construed, if it can reasonably be done, *ut res magis valeat quam pereat*. It should be the aim of the courts, in cases like this, to preserve and not to destroy. Sir Matthew Hale said they should be astute to find means to make acts effectual according to the honest intent of the parties." See for an application of the principle, *Talbert v. Dull*, 70 Tex. 675; s. c. 8 N. W. Repr. 530.

"It is against the spirit and genius of our government," said the Pennsylvania court, speaking of a certificate of acknowledgment made by a justice of the peace, "to extend nice technical objections to the acts

by the statute.¹ There are some exceptions to this rule, however,² and in no case will the entire omission of a distinct and material fact be supplied by presumption.³ The application of the rules as to substantial compliance is best shown by the illustrations given in the notes to these sections.

§80. Equivalent Expressions.

If the certificate, instead of the statutory terms, use other words of equivalent import, it will not be invalidated thereby.⁴ A literal compliance with the statute is not required, and a deviation from its terms will not vitiate, provided the certificate contains everything of substance prescribed by the law.⁵ Thus "executed" may be used for "signed, sealed and delivered," and the latter words will of magistrates who are called from the mass of the people to discharge duties without previous legal learning or experience." *Angier v. Schiefelin*, 72 Pa. St. 106; s. c. 13 Am. Rep. 659, citing *Rigler v. Cloud*, 2 Harris, 361.

¹ *Webb v. Huff*, 61 Tex. 677, cited *ante*, §54, notes; *Hobson v. KISSAM*, 8 Ala. 357.

² Nothing will be presumed in favor of the certificate of acknowledgment. *Wetmore v. Laird*, 5 Biss. 160. What is written in the statute, is written—and must be written in the certificate. *Jacoway v. Gault*, 20 Ark. 190; s. c. 73 Am. Dec. 494; *Wright v. Graham*, 42 Ark. 140; and for other cases requiring strict compliance, see *Myers v. Boyd*, 96 Pa. St. 427; *Knighton v. Smith*, 1 Or. 276; *Buell v. Irwin*, 24 Mich. 145. *Rogers v. Adams*, 66 Ala. 600; *Mount v. Kesterson*, 6 Coldw. 452.

³ To certify that the grantor appeared before the officer and signed the deed, is not sufficient. *McDaniel v. Needham*, 61 Tex. 269; *Rogers v. Adams*, *supra*.

⁴ "Separate and apart," held equivalent to "privily." *Combes v. Thomas*, 57 Tex. 321; and see *Deery v. Cray*, 5 Wall. 795, 806.

Where the certificate stated that the grantors, naming them, were known to the officer to be the persons described in and who executed *the same*, instead of the "foregoing instrument," it was held sufficient; the certificate being attached to the deed, but not referring to it otherwise than by the words "the same." *Smith v. Boyd*, 101 N. Y. 473.

Acknowledging the instrument "to be their act and deed," held equivalent to stating that "they signed, sealed and delivered the same." *Sharp v. Hamilton*, 12 N. J. L. 108; *Parsons v. Boyd*, 20 Ala. 112.

⁵ "Personally came," sufficiently imports that the party came *before the officer*. *Schley v. Pull. Car Co.*, 120 U. S. 575; and so, "known to me to be the person who executed the foregoing instrument," held equivalent to "personally known to me to be the real person who, and in

suffice for the term "executed."¹ Even the word "acknowledged" may be supplied by other words; as where the certificate stated that the president of a corporation being sworn, "deposes and says" that by authority of the board of trustees, etc., he did subscribe the deed.² A number of illustrations of the rule are given in the foot-notes.³

§81. Omission of Material Words.

The statutes require that the grantor acknowledge the execution of the instrument, and a failure in the certificate to state this fact by the use of the word "acknowledged," or other words of equivalent import, is fatal error.⁴ The certificate must show that the grantor acknowledged that *he* executed the instrument; a statement that the grantor acknowledged that ——— executed it, is insufficient.⁵ The omission of such formal expressions as "Given under my

whose name such acknowledgment is proposed to be made." *Id*; *Livingston v. Kettelle*, 1 Gilm. 116; s. c. 41 Am. Dec. 166.

"Voluntary act," will suffice for "voluntary act and deed." *Spitznagle v. Vanhessch*, 13 Neb. 338. Where the certificate recited that a deputy county clerk, who had executed a tax-deed, acknowledged its execution by him "as such county clerk," it was held sufficient. *Ward v. Walters*, 63 Wis. 39; s. c. 22 N. W. Repr. 844.

¹ *Smith v. Williams*, 38 Miss. 48; *Tubbs v. Gatewood*, 28 Ark. 128; *Stuart v. Dutton*, 39 Ill. 91.

² *Chouteau v. Allen*, 70 Mo. 290. But "stated," held not equivalent to "acknowledged." *Dewey v. Campau*, 4 Mich. 565.

³ "Acknowledged it," held sufficient for "acknowledged the execution of the annexed deed." *Davar v. Cardwell*, 27 Ind. 4.

"Acknowledged the foregoing instrument to be his act and deed," held equivalent to "acknowledged that he signed, sealed and delivered the foregoing deed." *Halls v. Thompson*, 1 Sm. & M. (9 Miss.), 443; and see also, *Pickens v. Knisely*, 29 W. Va. 1; s. c. 6 Am. St. Rep. 622.

Referring to the instrument as "the foregoing mortgage," when it is a deed, held not to vitiate. *Ives v. Kimball*, 1 Mich. 308. So, the use of "power or attorney," in place of "deed." *Hurt v. McCartney*, 18 Ill. 129.

⁴ *McDaniel v. Needham*, 61 Tex. 269; *Stanton v. Button*, 2 Conn. 527; *Cabell v. Grubbs*, 48 Mo. 353; *Dewey v. Campau*, 4 Mich. 565; *Short v. Conlee*, 28 Ill. 219; *Bryan v. Ramirez*, 8 Cal. 461; s. c. 68 Am. Dec. 340. But in *Basshor v. Stewart*, 54 Md. 376, the omission of "and acknowledged said mortgage," was held not fatal, although there were no other words in the certificate supplying their place.

⁵ *Huff v. Webb*, 64 Tex. 284; *Buell v. Irwin*, 24 Mich. 152. But see, *Musgrove v. Bosner*, 5 Or. 313; s. c. 20 Am. Rep. 737.

hand and seal," "for the purposes and considerations therein expressed," and the like, is usually held immaterial on the ground that they signify nothing, and therefore their presence or absence cannot add to or detract from the legal effect of the certificate.¹ It is held, however, in other cases that the courts have no right to dispense with such expressions, where prescribed by statute, because they may conceive them to be immaterial or meaningless.² So, for a like reason, and upon the ground of a supposed difference between a man's deed and his voluntary deed, the omission of the word "voluntary" has been held fatal.³ The omission of the name of the grantor and of the words of identity, has been already considered;⁴ omissions relating to the separate acknowledgments of married women will be treated in another chapter.⁵

§82. Clerical Omissions and Mistakes.

Errors and omissions of a manifestly clerical character are rarely held to vitiate the certificate.⁶ Many of these arise from oversight in filling blanks in the printed forms of certificate; and while an omission to state who acknowledged the instrument, or that it was acknowledged, has usually been held fatal, almost every other character of omission in filling such blanks, has been treated as a clerical mistake such as did not destroy the validity of the

¹ Webb v. Huff, 61 Tex. 677; Monroe v. Arledge, 23 Tex. 478; Hobson v. Kissam, 8 Ala. 357.

² Jacoway v. Gault, 20 Ark. 190; s. c. 73 Am. Dec. 494; Wetmore v. Laird, 5 Biss. 160.

³ Wickersham v. Reeves, 1 Iowa, 413; Spitznagle v. Vanhessch, 13 Neb. 338; Newman v. Samuels, 17 Iowa, 528. But see, Henderson v. Grewell, 8 Cal. 581; *ante*, §50, notes.

⁴ §§73-75. *ante*.

⁵ Ch. 4, *post*. The omission of "sealed and delivered" in "signed, sealed and delivered," held fatal. Toulman v. Heidleberg, 32 Miss. 268. Compare, Barton v. Morris, 15 Ohio, 408; Smith v. Elliott, 39 Tex. 201; *contra*, Mullins v. Weaver, 57 Tex. 5.

⁶ Quimby v. Boyd, 8 Colo. 194; s. c. 6 Pac. Repr. 462. The use of "contract" for "retract" in the certificate to a wife's acknowledgment, held immaterial. Belcher v. Weaver, 46 Tex. 293; s. c. 26 Am. Rep. 267. So, the omission of "appeared" from its usual place. Scharfenburg v. Bishop, 35 Iowa, 60.

record.¹ Where, through mistake in stating a wrong county in the caption, it appeared from the certificate that the officer did not have jurisdiction, evidence was admitted to show the mistake, and the certificate upheld.² A sheriff's deed was executed by the officer who made the sale, but appeared to have been acknowledged by his predecessor who made the levy. The court declined to assume that this was a clerical error, and held the certificate defective.³ Generally, where the defect can be reconciled, or does not, in a material degree, render the certificate indefinite or uncertain, it will not invalidate.⁴

§83. Surplusage.

Superfluous matter in the certificate will not vitiate it; as where, the statute not requiring it, the officer added in the certificate to a wife's acknowledgment, that she "wished

¹ Omission of "his" before "free and voluntary act," held not to vitiate. *Dickerson v. Davis*, 12 Iowa, 353; and so, of "be" in "known to me to be," *Johnson v. Badger Mill Co.*, 13, Nev. 351; and so, of "known" in "the contents of said instrument being fully made known to her," *Hornbeck v. Building Association*, 88 Pa. Stat. 64; and so, of "fully" in the same connection, *Hartshorn v. Dawson*, 79 Ill. 108; and of "are," after "who," *Id*; and of "before me," after the word "acknowledged," *Gordon v. Leech*, 81 Ky. 229, and after "appeared," *Schley v. Pull. Car Co.*, 120 U. S. 575.

² *Angier v. Schieffelin*, 72 Pa. Stat. 106; s. c. 13 Am. Rep. 659.

³ *Lincoln v. Thompson*, 75 Mo. 613; and see, *Cavitt v. Archer*, 52 Tex. 166. "The court cannot, by intendment or construction, fill a blank or supply a word." *Stanton v. Button*, 2 Conn. 527.

⁴ *Ogden v. Walters*, 12 Kan. 282. The certificate to a wife's deed stated that the contents of *said husband*, instead of "said deed," were fully made known to her; and it was held sufficient. *Calumet Co. v. Russell*, 68 Ill. 426.

A certificate that the grantors, well known to the officer, appeared, and that "they acknowledged that — signed and executed the within deed," omitting "they," was held sufficient in *Musgrove v. Bosner*, 5 Or. 313; s. c. 20 Am. Rep. 737. See, *contra*, *Buell v. Irwin*, 24 Mich. 152; *Huff v. Webb*, 64 Tex. 284.

As to erasures and interlineations, see *Bowlby v. Thunder*, 3 Atl. Repr. (Pa.), 588; *Devinney v. Reynolds*, 1 Watts & S. (Pa.), 328.

A deed purported to be executed by G. W. G. as attorney in fact for H. M. The certificate of proof for record by a subscribing witness was to the effect that he saw H. M. execute it as attorney in fact for G. W. G. The court refused to treat this as a clerical error. *Cavitt v. Archer*, 52 Tex. 166.

not to retract it.”¹ Where the certificate is put in the form of an affidavit, the signature of the party and *jurat* of the officer will be regarded as mere surplusage.² A certificate stated that the deed was executed and *proved* or acknowledged according to law. It was held that the words “or proved” were surplusage, there being nothing in the certificate to which they could be referred.³

§84. Dating the Certificate.

An omission to date the certificate, or an error in its date, will not invalidate it.⁴ A deed takes effect from its delivery;⁵ a date to it is not essential, and still less is it necessary to an acknowledgment.⁶ If there be no date to the certificate, the court will presume, in the absence of proof to the contrary, that the acknowledgment was taken at the time the deed bears date.⁷ Where the statute required the certificate of acknowledgment to state the time when it was taken, and this was not done, the court held that by reference to the date of the instrument and its certificate of record, the date of the acknowledgment

¹ Stuart v. Dutton, 39 Ill. 91; and see Draper v. Bryson, 17 Mo. 71; s. c. 57 Am. Dec. 257.

² Whitney v. Arnold, 10 Cal. 531; Ingraham v. Grigg, 13 S. & M. (21 Miss.), 22; Chouteau v. Allen, 70 Mo. 290. But the signature and *jurat* alone, are not sufficient. Dugger v. Collins, 69 Ala. 324.

³ Nelson v. Graff, 44 Mich. 433. But where the proof for record was by a subscribing witness, and the certificate was that the witness saw the grantor sign, or heard him acknowledge that he had signed the deed, it was held bad for uncertainty. Harvey v. Cummings, 68 Tex. 599; s. c. 5 S. W. Repr. 513.

For other cases of surplusage, see Chester v. Rumsey, 26 Ill. 97; Crowley v. Wallace, 12 Mo. 143; Tourville v. Pierson, 39 Ill. 446.

⁴ Webb v. Huff, 61 Tex. 677; Caruthers v. McLaran, 56 Miss. 371; Horsley v. Garth, 2 Gratt. 471; s. c. 44 Am. Dec. 393; Yorty v. Paine. 62 Wis. 154; s. c. 22 N. W. Repr. 137; Sidwell v. Birney, 69 Mo. 146; Brooks v. Chaplin, 3 Vt. 281; s. c. 23 Am. Dec. 209; Shields v. Netherland, 5 Lea, 193; Trulock v. Peeples, 1 Ga. 3; Lea v. Polk, 21 How. 493; Rackleff v. Norton, 19 Me. 274; Irving v. Brownell, 11 Ill. 402; Hobson v. Kissam, 8 Ala. 327.

⁵ Caruthers v. McLaran, *supra*.

⁶ 3 Black. Com. 307; 1 Steph. Com., p. 459; Webb v. Huff, *supra*.

⁷ Trulock v. Peeples, 1 Ga. 3; and see Wickes v. Caulk, 5 Har. & J. 36.

was sufficiently determined;¹ and where, under such a statute, the date of the certificate was prior to that of the deed, it was presumed to be correct, and that the error was in the date of the deed.²

§85. Signature of the Officer.

The officer must sign the certificate; it is not enough that he has written his name in the body of it.³ This construction arises in part from the specific requirement of some of the statutes that the officer shall sign and seal the instrument; and in part from considerations of public policy growing out of the fact that these certificates, involving but a small fee to the officer, are often given on printed forms, in which the officer's name and title is written beforehand in the appropriate blanks, so that any other rule as to the signature would afford opportunities for fraud to be committed with comparative impunity.⁴ The officer's title may be shown in connection with the signature, or in the body of the certificate.⁵

§86. Certificate on Same Sheet with Deed.

The Revised Statutes of Texas provide "that any officer taking the acknowledgment of a deed or other instrument

¹ *Kelley v. Rosenstock*, 45 Md. 389. A deed was executed in 1881, and the certificate of acknowledgment purported to bear date in 1880. *Held* immaterial. *Yorty v. Paine*, 62 Wis. 154; s. c. 22 N. W. Repr. 137. So, where the certificate of acknowledgment was dated April 21, and the deed April 23, of the same year. *Hagenbuck v. Phillips*, 112 Pa. St. 284; s. c. 6 Eastern Repr. 802; 3 Atl. Repr. 788; and see *Attaway v. Carter*, 1 Tex. Un. Cas. 73, 77.

² *Cover v. Manaway*, 115 Pa. St. 338; s. c. 8 Atl. Repr. 393; 2 Am. St. Rep. 552. Antedating the deed is of no avail. *Simpson v. Lovering*, 3 Bush. 458; s. c. 96 Am. Dec. 252. A discrepancy of dates is immaterial. *Sellers v. Sellers*, 98 N. C. 13; s. c. 3 S. E. Repr. 917.

³ *Marston v. Bradshaw*, 18 Mich. 81; s. c. 100 Am. Dec. 152; *Bigelow v. Booth*, 39 Mich. 624; *Jefferson v. Heil*, 81 Ky. 513; *Carlisle v. Carlisle*, 78 Ala. 542; *Clark v. Wilson* (Ill.), 19 N. E. Repr. 860.

⁴ *Marston v. Bradshaw*, *supra*.

⁵ See §68, *ante*. An alteration of a deed, after acknowledgment and before delivery, which restricts instead of enlarging the interest conveyed, does not necessitate a new acknowledgment. *Webb v. Mullins*, 78 Ala. 111.

of writing must place thereon his official certificate signed by him and given under his seal of office.”¹ The codifiers in submitting the Revised Statutes to the legislature for adoption, stated in their accompanying report that their object in requiring the certificate to be *placed on the deed* was to prevent affixing the certificate with mucilage, etc.² The Supreme Court of that state, however, held as sufficient a certificate so attached. The report of the codifiers, it is said in the decision, was not enacted as part of the revision, nor otherwise prescribed as a source from which to ascertain the legislative intent as expressed in the statutes; but the legislature had prescribed certain rules of construction, and under them the usual meaning of the word “placed” could not be restricted so as to exclude attaching the certificate to the deed with mucilage in the common method.³ In Ohio the court reach a different conclusion as to attaching the certificate, but under a statute somewhat more definite in its terms. There the requirement was that the officer should “certify the acknowledgment on the same sheet on which the deed is written or printed,” and it was held that a certificate written on a separate paper and attached to the deed in the usual method was invalid. The object of the requirement, it was said, was to guard against fraud and mistake, and a certificate so attached was in violation of the plain terms and the meaning of the statute.⁴

§87. When and of what the Certificate is Conclusive.

• • In all cases the certificate of acknowledgment is *prima facie* proof of its genuineness, and that the officer making it is such officer as he purports to be, and that the facts therein recited are true, if they are such facts as the officer

¹ Art. 4311.

² 2 Sayles' Tex. Ann. Stats., p. 734.

³ Schramm v. Gentry, 63 Tex. 583.

⁴ Winkler v. Higgins, 9 O. St. 599.

is by law required to certify.¹ The least that can be claimed for it is that it is *prima facie* proof.² When, by whom and under what circumstances this presumption of law may be rebutted, and the recitals contradicted or disproved, will be found to depend on a variety of considerations. It is well settled that parol evidence will not be admitted to supply defects in the certificate so as to make a valid certificate out of that which is otherwise invalid. The certificate cannot rest partly in writing and partly in parol.³ A limited number of cases holding that where the certificate does not show the official character of the officer, this may be shown by parol evidence, may be regarded as in the nature of an exception to this rule.⁴

Also where the certificate is regular and sufficient on its face, it cannot be defeated on account of mere irregularity in the taking of the acknowledgment.⁵ Matters of no greater weight and consequence than this, will not suffice to overcome the presumption of law in favor of an official act. The grantor who has requested an officer to take and certify his acknowledgment, and who has made what he then understood to be a proper acknowledgment, is estopped to deny his own act on account of irregularities in the form

¹ *People v. Snyder*, 41 N. Y. 397, and cases cited, §63, *ante*; *Wharton on Ev.* 1052; *Keen v. Coleman*, 3 Wright, 299; *Schrader v. Decker*, 9 Pa. St. 14; s. c. 49 Am. Dec. 538; *Miller v. Wentworth*, 82 Pa. St. 280. A statement in the certificate that the grantor is of age may be contradicted. *Williams v. Baker*, 71 Pa. St. 476.

² *Borland v. Walrath*, 33 Iowa, 130.

³ *Sewall v. Haymaker*, 127 U. S. 719; *Ennor v. Thompson*, 46 Ill. 214; *Lindley v. Smith*, 46 Ill. 523; *Ross v. McLung*, 6 Pet. 283; *Smith v. Allis*, 52 Wis. 337; s. c. N. W. Repr. 155; *Ins. Co. v. Nelson*, 103 U. S. 544; *First Nat'l Bk. v. Paul*, 75 Va. 594; s. c. 40 Am. Rep. 740; *Jourdan v. Jourdan*, 9 Serg. & R. 268; s. c. 11 Am. Dec. 724; *Watson v. Bailey*, 1 Binn. 470; s. c. 2 Am. Dec. 462; *Looney v. Adamson*, 48 Tex. 619; *Berry v. Donley*, 26 Tex. 737, 747; *Hitz v. Jenks*, 123 U. S. 298.

⁴ *Bennett v. Paine*, 7 Watts, s. c. 32 Am. Dec. 765; and cases cited in note to §68, *ante*.

⁵ *Miller v. Wentworth*, 82 Pa. St. 280; *Jamison v. Jamison*, 3 Whart. 457; s. c. 31 Am. Dec. 536; *Barnet v. Barnet*, 15 Serg. & R. 72; *Shields v. Netherland*, 5 Lea, 103; *Cox v. Gill*, 83 Ky. 669; *Harpending v. Wiley*, 14 Bush. 380.

and details of taking, or even of certifying it. As to him it is sufficient if the law holds as done that which he attempted to do, and to have done.¹ The rule as to irregularities and estoppel is subject to some exception in the matter of the separate acknowledgment of married women.²

In several states the certificate is by statute made *prima facie* evidence only; and the influence of these statutes is shown in the admission-of parol evidence, without connecting the grantee with any fraud, to show for instance, that the deed of a married woman was not in fact explained to her by the officer.³ Owing to this difference in the statutes, and also to a difference in the courts, the decisions as to the conclusiveness of the certificate are not uniform.

§88. Continued—How far Certificate Conclusive.

Regarded from the stand-point of reason and of public policy, it would seem that certificates of acknowledgment should in most respects be held as conclusive as judgments of a court, and upheld in substantially the same degree. Formerly acknowledgments were largely taken in open court,⁴ and although, for the sake of convenience, this method has been changed, there has not necessarily been any change in the underlying principle of the matter. The

¹ Jackson v. Colden, 4 Cow. 266.

² But a widow who has paid the interest upon a mortgage, will be deemed to have ratified it, and will be estopped to deny that the requisite private examination was made. O'Keefe v. Handy, 31 La. Ann. 832; Riggs v. Boylan, 4 Biss. 445.

³ Code of Wash. Ter. (1881), §2321; Hitz v. Jenks, 123 U. S. 298; Dodge v. Hollingshead, 6 Minn. 25; s. c. 80 Am. Dec. 433; Van Bracklin v. Fonda, 12 Johns. 468; s. c. 7 Am. Dec. 339; Forgarty v. Finlay, 10 Cal. 239; s. c. 70 Am. Dec. 714; Hutchison v. Rust, 2 Gratt. 394; Ford v. Teal, 7 Bush, 158; Hughes v. Coleman, 10 Bush, 248; Rev. Stats. Ky., 1 Slanton, 282; Drury v. Foster, 2 Wall. 24; s. c. 1 Dill. 460; Landers v. Bolton, 26 Cal. 393; Comp. Laws of Utah, p. 255, §9; Tarpey v. Desert Salt Co., 14 Pac. Repr. 338; Johnson v. Burden, 40 Vt. 567; s. c. 94 Am. Dec. 436.

⁴ Blanchard v. Taylor, 7 B. Mon. 647; Elliott v. Peirsoll, 1 Pet. 328. "The act is clothed with the same force and effect that was anciently produced by the court of record * * * and takes the place of the judgment of former times." Merritt v. Yates, 71 Ill. 639; s. c. 22 Am. Rep. 128; Sewell v. Haymaker, 127 U. S. 719.

certificate is a written declaration and determination, by an officer appointed by law, of matters within his jurisdiction to determine and certify. The officer acts under the sanction of his oath and the penalties of his bond; he must not be directly interested in the matter, and in a certain sense, as repeatedly held by the courts, he acts in a judicial capacity.¹ The integrity and conclusiveness of certificates of acknowledgment to deeds, is a matter on which the security of titles largely depends; and while there is much difference in the manner of impeaching a certificate and of attacking a judgment, an examination of the decided cases will show that in very many instances, the courts have required, in order to set aside or defeat a certificate, substantially the same character and degree of evidence as required to set aside a judgment. That the grantor did not in fact appear before the officer to make any acknowledgment is a matter that may always be shown,² for the reason that in such case the officer is without jurisdiction in the premises, as much so as a court would ordinarily be without jurisdiction where there are no parties properly before it. Like the deed itself, or a judgment, the certificate of acknowledgment may be shown a forgery by any person interested in the property, and is at all times open to attack on this ground, as well as upon the ground that no acknowledgment was in fact made or attempted.³

§89. Certificate may be Impeached for Fraud.

It has been stated, as a general proposition, that the certificate cannot be impeached for anything but

¹ *Kerr v. Russell*, 69 Ill. 666; s. c. 18 Am. Rep. 634; *Lickman v. Harding*, 65 Ill. 505; *Wasson v. Conner*, 54 Miss. 352; *Hector v. Glasgow*, 79 Pa. St. 79; s. c. 21 Am. Rep. 46; and cases cited in note 3, §65, *ante*.

² *Strauch v. Hathaway*, 101 Ill. 11; s. c. 40 Am. Rep. 193; *Smith v. Ward*, 2 Root, 378; s. c. 1 Am. Dec. 80; *Michener v. Cavender*, 38 Pa. St. 334; s. c. 80 Am. Dec. 486; *Donahue v. Mills*, 41 Ark. 421; *Williamson v. Carskadden*, 36 O. St. 664.

³ *McKinnon v. McLean*, 2 Dev. & Bat. 79, and cases last cited above.

fraud. This must be understood as having no reference to proving the certificate a forgery, or to disproving the entire fact of acknowledgment; and the term fraud must be understood to include such matters of gross imposition, duress and gross concurrent mistake as constitute a species of legal fraud, though not within the ordinary meaning of the word.¹ Expressions are to be found in the books that seem to make quite a distinction between cases where the certificate is sought to be impeached “as between the parties,”² and cases where the property has passed to a subsequent vendee, but the distinction is one of fact rather than of law. The grantee in the deed, as a matter of fact, is more likely to be a participant in the fraud, and to have knowledge or notice of it, than a subsequent purchaser; but if such knowledge or notice can be clearly brought home to the subsequent vendee, equity will not suffer him to occupy any better position in the matter than his vendor.³

If the grantee had no knowledge of any fraud, imposition or collusion by which the acknowledgment was obtained, and there was nothing justly putting him on notice of it, he cannot be affected by it, and the certificate is conclusive.⁴ It does not devolve on him to see that the grantor

¹ Williams v. Baker, 71 Pa. St. 476; Pereau v. Frederick, 17 Neb. 117; s. c. 22 N. W. Repr. 235; Schrader v. Decker, 9 Barr, 14; s. c. 49 Am. Dec. 538; Whart. on Ev., §§1052, 495; Green v. Seranage, 19 Iowa, 461; s. c. 87 Am. Dec. 447; Central Bank v. Copeland, 18 Md. 305; s. c. 81 Am. Dec. 597.

² Williams v. Baker, *supra*; Homeopathic Co. v. Marshall, 32 N. J. Eq. 106; Whart. on Ev., §1052.

³ Ormsby v. Budd, 72 Iowa, 80; s. c. 33 N. W. Repr. 457; McCanless v. Engle, 51 Pa. St. 309; White v. Graves, 107 Mass. 325; Michener v. Cavender, 38 Pa. St. 334; s. c. 80 Am. Dec. 486; Warren v. Hall, 53 Mich. 371; *Somes v. Brewer*, 2 Pick. 184.

⁴ Webb v. Burney, 70 Tex. 322; s. c. 7 S. W. Repr. 841; Hartley v. Frosh, 6 Tex. 208; s. c. 55 Am. Dec. 772; Henderson v. Terry, 62 Tex. 281; McDannell v. Horrell, 1 Tex. Un. Cas. 521; Kerr v. Russell, 69 Ill. 666; s. c. 18 Am. Rep. 634; Harkins v. Forsythe, 11 Leigh, 294; Johnston v. Wallace, 53 Miss. 331; s. c. 24 Am. Rep. 699; Singer v. Rook, 84 Pa. St. 442; s. c. 24 Am. Rep. 204; Ridgley v. Howard, 3 H. & McH., 211; Hitz v. Jenks, 123 U. S. 298; Young v. Duvall, 109 U. S. 573, 577;

is not imposed on by third parties who may be interested in having the conveyance made; nor to see that the notary does his duty in making the privy examination of a married woman.¹ But if he has knowledge of facts that should put him on inquiry, and remains silent and inactive on the subject, it is at his peril.²

§90. The Evidence Necessary to Overcome the Certificate.

The certificate constitutes the evidence of the execution of the deed to which subsequent purchasers must ordinarily look, and upon which they must rely, and the proof of fraud to destroy it must be clear, cogent and convincing: a mere preponderance of evidence will not suffice.³ The

Hall v. Patterson, 51 Pa. St. 239; Pouns v. Williams, 48 Tex. 141; Downing v. Blair, 75 Ala. 216; Meyer v. Gosset, 38 Ark. 377; Baldwin v. Snowden, 11 O. St. 203; s. c. 78 Am. Dec. 303; White v. Graves, 107 Mass. 325; s. c. 9 Am. Rep. 38; Lane v. Schlemmer, 114 Ind. 296; s. c. 5 Am. St. Rep. 621; Rollins v. Menager, 22 W. Va. 461; Mays v. Hedges, 79 Ind. 288; Marsh v. Mitchell, 26 N. J. Eq. 497; Shields v. Netherlands, 5 Lea, 193; Smith v. Allis, 52 Wis. 337; Johnson v. Van Velsor, 43 Mich. 208; s. c. 5 N. W. Repr. 273; Moore v. Fuller, 6 Or. 272; Davis v. Kennedy, 58 Tex. 516; DeArnaz v. Escandon, 59 Cal. 486. See, however, Central Bank v. Copeland, 18 Md. 305; s. c. 81 Am. Dec. 597.

¹ Pierce v. Fort, 60 Tex. 464; Henderson v. Smith, 23 W. Va. 829; s. c. 53 Am. Rep. 139.

² Michener v. Cavender, 38 Pa. St. 334; s. c. 80 Am. Dec. 486; Pierce v. Fort, *supra*; Loudon v. Blythe, 16 Pa. St. 532; s. c. 55 Am. Dec. 527; 27 Pa. St. 22; 67 Am. Dec. 442.

³ Barnett v. Preskauer, 62 Ala. 486; Jourdan v. Jourdan, 9 Serg. & R. 268; s. c. 11 Am. Dec. 724; Ford v. Osborne, 45 O. St. 1; Sisters v. Catholic Bishop, 86 Ill. 171; Hughes v. Coleman, 10 Bush, 248; Marston v. Brittenham, 76 Ill. 611; Grotenkemper v. Carver, 9 Lea, 280; Bailey v. Landingham, 53 Iowa, 722; Riecke v. Westenhoff, 10 Mo. App. 358; Young v. Duvall, 109 U. S. 573; Shelton v. Aultman, 82 Ala. 315.

A simple majority of witnesses will not answer. Strauch v. Hathaway, 101 Ill. 11; s. c. 40 Am. Rep. 193. The evidence must be clear and convincing beyond a reasonable doubt. Russell v. Baptist Union, 73 Ill. 337, 341; Cox v. Gill, 83 Ky. 669.

For cases in which the evidence was held sufficient to overcome the certificate, see Borland v. Walrath, 33 Iowa, 130; Pickens v. Knisely, 29 W. Va. 1; s. c. 6 Am. St. Rep. 622; Lowell v. Wren, 80 Ill. 238, quoted at length in Devlin on Deeds, §533. See also, Webb v. Webb, 87 Mo. 540; s. c. 4 West Repr. 618; Michener v. Cavender, 38 Pa. St. 334; s. c. 80 Am. Dec. 486; Schrader v. Decker, 9 Barr, 14; s. c. 49 Am. Dec. 538.

officer who certified the acknowledgment will not be heard to stultify himself by testifying that he did not take it, or that it was not properly taken as stated in the certificate.¹ His certificate is entitled to at least equal credibility with his oath, and public policy cannot permit testimony so dangerous to the titles of the country. When the certificate is attacked as a forgery or fabrication, it is not sufficient that the officer who purports to have signed it, does not remember the transaction.² The grantor is an interested witness, and his unsupported testimony is not sufficient to overcome the certificate;³ nor is the proof of any one witness, not supported by corroborating circumstances.⁴ The improbability of misconduct in a reputable officer, who is not a party to the transaction, and who acts under oath, and is liable to indictment for the misconduct, as well as under his bond, is greater than is that of falsehood or error in an interested witness.⁵

Johnston v. Wallace, 53 Miss. 331; s. c. 24 Am. Rep. 699; *Stone v. Montgomery*, 35 Miss. 83; *Hightower v. Stiffler*, 21 Md. 338; s. c. 83 Am. Dec. 593; *Kennedy v. Ten Broeck*, 11 Bush, 250; *Central Bank v. Cope-land*, 18 Md. 305; s. c. 81 Am. Dec. 597; *Harkins v. Forsythe*, 11 Leigh, 294.

By force of certain statutes, the evidence of the officer is sometimes admitted to contradict the certificate. *Garth v. Fort*, 15 Lea, 683; *Kilbourn v. Fury*, 26 O. St. 153. The notary is a competent witness for the purpose of showing that the deed was duly executed, when its execution is denied. *Jansen v. McCahill*, 22 Cal. 563; s. c. 83 Am. Dec. 84, 593.

² *Wright v. Bundy*, 11 Ind. 398; *Tooker v. Sloan*, 30 N. J. Eq. 394.

That the officer is not certain that the person in whose name a deed is executed is the same person whose acknowledgment he took, and thinks such person was a smaller man, is not sufficient. *Sisters v. Catholic Bishop*, 86 Ill. 171.

³ *Fitzgerald v. Fitzgerald*, 100 Ill. 385; *Canal Co. v. Russell*, 68 Ill. 426; *Lickman v. Harding*, 65 Ill. 505; *Homeopathic Co. v. Marshall*, 32 N. J. Eq. (5 Stew.), 106.

⁴ *Warrick v. Hull*, 102 Ill. 280. And see, *Strauch v. Hathaway*, 101 Ill. 11; s. c. 40 Am. Rep. 193; *Washburn v. Roesch*, 13 Ill. App. 268; *Young v. Duvall*, 109 U. S. 573; *Smith v. McGuire*, 67 Ala. 34; *Tett v. Rogers*, 12 Bush, 564.

⁵ *Russell v. Baptist Union*, 73 Ill. 341. The unsupported testimony of the wife is insufficient. *Knowles v. Knowles*, 86 Ill. 1; *Marston v. Brittenham*, 76 Ill. 611; and see also, *Cover v. Manaway*, 115 Pa. St. 338;

§91. Amendment of the Certificate.

The right of an officer to amend his certificate of acknowledgment after the deed has been recorded is affirmed and denied by something like an equal weight of authority in the decided cases. In Texas, California and some other states, there are statutory provisions to the effect that where an acknowledgment has been properly made but defectively certified, any person interested may have an action in the proper court to obtain a judgment correcting the certificate.¹ By the aid of such statutes a correction can be obtained when the officer neglects or refuses to make the proper certificate, or when by reason of death, removal or expiration of his term of office, the correction cannot be made by him. But the officer himself, it is held, may make the correction, or rather the correct certificate, at any time while he continues in office.² He cannot, of course, correct the certificate, or give a new one, or perform any other official act in the premises after his term of office has expired.³ Where the officer neglected to sign the certificate of a married woman's acknowledgment, and the deed had been recorded for ten months, it was held that, unless the rights of third persons had intervened, the proper correction could be made, and at any time while he remained in office.⁴ So, where the officer neglects to affix his seal;⁵

s. c. 2 Am. St. Rep. 552; Jarrell v. Jarrell, 27 W. Va. 743; Rust v. Goff, 94 Mo. 511; s. c. 13 West. Repr. 608; 7 S. W. Repr. 418.

¹ Rev. Stats. of Tex. (1879), §4353; Johnson v. Taylor, 60 Tex. 360; Civ. Code of Cal., §1202; Hutchinson v. Ainsworth, 63 Cal. 286. In Tennessee the officer may correct his certificate by making oath in open court. Brinkley v. Tomeny, 9 Baxt. 275; Fall v. Roper, 3 Head. 485; Vaughan v. Carlisle, 2 Lea, 525; Stroud v. McDaniel, 12 Lea, 617; Garth v. Fort, 15 Lea, 683.

² Jordan v. Corey, 2 Ind. 385; s. c. 52 Am. Dec. 517; Wannal v. Kem, 51 Mo. 150; Ralston v. Moore, 83 Ky. 571; Harmon v. Magee, 57 Miss. 410; Bowlby v. Thunder, 3 Atl. Rep. (Pa.), 588; Fall v. Roper, 3 Head. 485; Miller v. Powell, 53 Mo. 252; C. B. & Q. Ry. v. Lewis, 4 N. W. Repr. 842.

³ Gilbraith v. Gallivan, 78 Mo. 452.

⁴ Harmon v. Magee, *supra*.

⁵ Stoll v. Harrison, 73 Ind. 20. See King v. Russell, 40 Tex. 124.

and to insert in the certificate that the married woman was examined without the presence of her husband.¹

§92. Amendment of Certificate—Continued.

The right of the officer to make any correction whatever has been strenuously denied,² but the reasoning in support of the objection is not satisfactory. It is said that the officer acts as under a special commission, and that when he has taken the acknowledgment and delivered the certificate, his power over the subject is exhausted, just as that of a notary who has returned a deposition to a court.³ But there is no special delegation of authority made, or necessary to be made, in order that an acknowledgment may be taken; no court to which the officer makes a return, and no analogy between the cases. It has also been said that if the officer has the right to amend the certificate by showing an acknowledgment, he has the right to contradict it by denying all acknowledgment.⁴ This, however does not follow, and such a right is not claimed for the officer. He will not be heard in court, nor permitted out of court, to impeach his certificate showing an acknowledgment, by de-

¹ *Jordan v. Corey, supra.*

As to admitting the certificate in evidence, although the mistake has not been corrected, see *Merchant's Bank v. Harrison*, 39 Mo. 433; *Sharp v. Hamilton*, 12 N. J. L. 109; *Northrop v. Wright*, 7 Hill, 476.

² *Wedel v. Harmon*, 59 Cal. 507; *First Nat'l Bank v. Paul*, 75 Va. 594; s. c. 40 Am. Rep. 740; *Merritt v. Yates*, 71 Ill. 639; s. c. 22 Am. Rep. 128; *Bours v. Zachariah*, 11 Cal. 281; s. c. 70 Am. Dec. 779; *Elliott v. Peirsoll*, 1 Pet. 328; *Enterprise Transit Co. v. Sheedy*, 103 Pa. St. 492; s. c. 49 Am. Rep. 130; *McMullen v. Eagan*, 21 W. Va. 233; *Devlin on Deeds*, §§539-546; *O'Farrall v. Simplot*, 4 Iowa, 381.

³ *Bours v. Zachariah, supra.* In this case the court advances one idea worthy of note here, viz: that the human memory is uncertain, and that the allowance of such amendments subjects the titles of the country to the mercy of the officers' memories. But while memory allows facts to slip from its grasp, lapse of time does not usually generate a recollection of facts that did not occur.

⁴ *Bours v. Zachariah, supra.* The opinion in this case is quoted at length in 1 *Devlin on Deeds*, §542. "The clerk does not contradict his own certificate by showing he did something more than appears from the record"—hence such amendment allowed. *Ralston v. Moore*, 83 Ky. 571.

nying the truth of what he has certified.¹ The case is where the certificate does not show an acknowledgment; where, being deficient in law, it fails of effect, and there is nothing, legally, to be contradicted; where it is apparent that the duty imposed upon the officer by the request of the grantor acknowledging has not been properly discharged. That there is error in the certificate is patent, except on the theory that the grantor has fraudulently requested the officer not to take his acknowledgment properly, but to take an improper acknowledgment, or to certify it insufficiently. The rights of third persons that may have intervened are not to be affected by the amendment; and the right of any other person to object to a second or corrected certificate cannot properly be greater than his right to have objected to the issuance of a correct certificate in the first instance. Often the deed is attested by subscribing witnesses, and is delivered to the grantee unacknowledged, and without the proof for record having yet been made. The grantee may have it proved for record at any time thereafter;² and that he must apply to the officer a second time to get a proper certificate of the proof made out, and that he must have his deed recorded a second time in order to get a proper record of it, are matters with which the grantor has no concern. The presence, at the writing out of the certificate, of the person acknowledging or the witness proving the deed, is not required by law, and, therefore, no necessity exists for again bringing the party before the officer to repeat his former statement.³ A recording officer, it is held, has the right to correct a mistake made by him in recording the deed,⁴ and since all correc-

¹ *Stone v. Montgomery*, 35 Miss. 83, and other cases cited in note 1, §90. *ante*.

² It is the duty of the purchaser, not of the vendor, to have the deed probated. *Carter v. Corley*, 23 Ala. 612.

³ *Harmon v. Magee*, 57 Miss. 410.

⁴ *Baldwin v. Marshall*, 2 Humph. 116; *Chamberlain v. Bell*, 7 Cal. 292; S. C. 68 Am. Dec. 260.

tions must be made subject to the rights of third persons that may in the meantime have accrued on the faith of the record as at first made, it would seem that the acknowledging officer has an equal right to correct mistakes in his part of the record.¹

§93. Amendment of Certificate—Married Women.

In those states, about one-half in number, where a privy examination of married women is required, if the defect in the certificate be that it fails to show the requisite separate examination and consent of the wife, the objection to an amendment of such certificate presents at least a debatable question. The principles of equity have been somewhat stretched in holding that a married woman who appears before an officer and makes what she then understood to be a sufficient acknowledgment, can afterwards take advantage

¹ Mr. Martindale in his work on Conveyancing (§292), doubts that a second registration of the deed would be valid without legislative sanction, because a question might arise as to which record is to be held as imparting the notice, and because the searcher, finding the first record, might not be bound to continue his search. He, therefore, suggests the record of a new deed. The searcher, however, would be no more likely to find the second deed than to find the second record of the first deed. "Every consideration of the subject and construction of the statute founded in the convenience or inconvenience, real or supposed, of searching the records, * * * is wholly impertinent." Dixon, C. J., in *Fallas v. Pierce*, 30 Wis. 442. One who searches and actually reads or sees the first record, although the acknowledgment to it be defective, would be thereby put on inquiry and charged with notice. *Walter v. Hartwig*, 106 Ind. 123; s. c. 3 West. Repr. 881; *Musgrove v. Bosner*, 5 Or. 313; s. c. 20 Am. Rep. 737; *Hastings v. Cutler*, 4 Foster, 481. The necessity for the new record is to charge with constructive notice those who do not actually examine the records. A re-record of the deed, and not an alteration of the record as first made, is the proper practice, in order that the date of the correct record may clearly appear. A note should be made in the margin of the first record, showing where the new record may be found. *King v. Bales*, 44 Ind. 219.

Where the wife makes a new acknowledgment, unless the rights of third parties have intervened, it will relate back. *Cahall v. Mutual Assoc.*, 61 Ala. 232. But not as against such rights. *Coal Creek Co. v. Heck*, 83 Tenn. (15 Lea), 497, 513; *Fall v. Roper*, 3 Head. 486; *Harrison v. Wade*, 3 Cold. 505.

In Tennessee it has been held that the deed of a woman, made while she was *sole*, cannot be recorded after her marriage without a separate acknowledgment. *Johnson v. Walton*, 1 Sneed, 258.

of the manner in which it was taken, and avoid her deed for want of a full compliance with the particulars of the law in the matter of the acknowledgment;¹ but no equity whatever exists in her favor where the acknowledgment was in fact properly made, and the defect is merely that the officer, through mistake or oversight, failed to certify it as required by law. In such latter case, the question is whether the wife actually made the proper acknowledgment. This fact the law requires to be shown by the certificate of the officer, and the objection is that having issued a certificate that fails to show it, he should not be permitted to give another and different one. It is not reasonable to presume that the officer would have intentionally given a certificate that is a nullity, but rather that if the proposed acknowledgment had actually failed in any essential particular, he would have declined to certify an acknowledgment, and that the defect in the certificate is the result of clerical oversight. Nor is there, in reason, any stronger presumption in favor of the truth of the invalid and abortive certificate than in favor of an amended or second certificate, showing that that was properly done² which the grantor's appearance before the officer evidently contemplated should be done. If the officer be false, both certificates are unreliable; but if he be truthful, as the law presumes, and as the parties must be held to have presumed when entrusting the business to him, the latter certificate must be held the correct one.³

¹ That the *feme covert* received the purchase money; used it in improving her separate property, and had acquiesced in the sale by permitting her vendees to improve the land; *held*, not to estop her or her heirs from recovering the land, where the acknowledgment of her deed was not in compliance with the statute. *Johnson v. Bryan*, 62 Tex. 623; *Berry v. Donley*, 26 Tex. 745; *Coal Co. v. Pasco*, 79 Ill. 170; *Huffman v. Huffman*, 118 Pa. St. 458; s. c. 10 Cent. Repr. 908. The privy examination is now abolished by statute in Illinois and many other states. See *post*, ch. 4.

² *Jackson v. Gilchrist*, 15 Johns. 89.

³ The officer may be compelled by *mandamus* to execute a proper certificate if the facts exist that warrant it. *Wannall v. Kem*, 51 Mo. 151.

In *Elliott v. Piersoll*, 1 Pet. 328, the denial of the officer's right to amend seems to be placed, in part at least, on the ground that in this

§94. Correction of Certificates of Acknowledgment by the Courts.

As already mentioned, there are in some states statutory provisions for correcting defective certificates of acknowledgment by special suit for that purpose.¹ These statutes usually provide only for cases where the acknowledgment was in fact properly taken. If not actually taken as required by law, a court of equity has no power to correct the error, though it may have been the result of mistake.² And it is held generally that courts of equity have no power to correct any mistake of the officer in the certificate of acknowledgment,³ but there are decisions to the contrary where the mistake is of a formal character. Thus where the same person was commissioner of deeds for two states, and described himself in the certificate as commissioner for the wrong state, it was held that equity would relieve against the mistake.⁴

matter he acts ministerially, and not judicially; while in *Wedel v. Harmon*, 59 Cal. 507, the right is denied because he acts judicially, and not ministerially.

¹ *Ante*, §91: *Johnson v. Taylor*, 60 Tex. 360. So, where an instrument is entitled to be proved for record, an action may be had for a judgment proving it. Rev. Stats. of Tex., §1354; and the cause of action under that statute held transitory and not local as to venue. *Pegram v. Owens*, 64 Tex. 475. In some states there are statutory provisions for compelling an acknowledgment, where the grantor refuses to make it; and for a provisional record of the deed, without acknowledgment, pending such proceedings, or pending proceedings for proof of the instrument. Gen. Laws of N. H. (1878), ch. 135, §11; Rev. Laws of Vermont (1889), §1944; Stimson's Am. Stat. Law, §§1631, 1632.

² Proof that the wife in fact understood the character of the instrument signed by her; that she was not induced to sign it by the influence of her husband; that she was not under his control, but was, rather than he, the business manager and trader in the marital partnership; that for a long time she continued satisfied with the conveyance, and that the consideration for the land was used for the support of herself and family, held not to authorize a court to give effect to her deed where the separate examination was not had. *Berry v. Donley*, 26 Tex. 737. And see *Goss v. Furman*, 21 Fla. 406; *post*, §§98, 121; *Huffman v. Huffman*, 118 Pa. St. 458; s. c. 12 Atl. Repr. 308.

³ *Eyster v. Hathaway*, 50 Ill. 521; s. c. 99 Am. Dec. 537; *Shryer v. Nickell*, 55 Mo. 264; *McBride v. Wilkinson*, 29 Ala. 662, and cases cited in note to *Jordan v. Corey*, 52 Am. Dec. 517.

⁴ *Simpson v. Montgomery*, 25 Ark. 365; s. c. 99 Am. Dec. 228.

§95. Acknowledgment of Ancient Deeds.

For the acknowledgment and proof of ancient deeds the law does not require as strict a showing as in case of recent ones.¹ Thus where the certificate of acknowledgment to an ancient deed recited that the grantor and his wife came before the officer to acknowledge the deed, it was held to import also that they did acknowledge it, and that it would be presumed that the wife was privily examined.² Where the deed is thirty years old, it is admissible in evidence without proof of its execution;³ the witnesses are presumed dead;⁴ and where the deed had been registered for twenty years on a defective certificate of acknowledgment, its probate was conclusively presumed to be proper.⁵ The certificate of record endorsed on an ancient deed is sufficient evidence that it was recorded at the time stated therein.⁶ The presumption of due execution does not attach where a certified copy is offered in evidence;⁷ at least not without proof of the antiquity of the record as well as of the deed, or other corroborating evidence of age.⁸

¹ *Coulson v. Walton*, 9 Pet. 62. The presumptions of regularity and due execution should be indulged "to repair the ravages of time." *Howard v. Colquhoun*, 28 Tex. 134, 145.

² *Jackson v. Gilchrist*, 15 Johns. 89.

³ *Applegate v. Lexington*, 117 U. S. 256; *Harland v. Howard*, 79 Ky. 373; *Caruthers v. Eldredge*, 12 Gratt. 670; *King v. Merritt* (Mich.), 34 N. W. Repr. 689; *Dodge v. Briggs*, 27 Fed. Repr. 160; *Woods v. Transportation Co.* (Ala.), 3 South. Repr. 475.

⁴ *Winn v. Patterson*, 9 Pet. 663; *Barr v. Gratz*, 4 Wheat. 215.

⁵ *Stroud v. McDaniel*, 12 Lea, 617. See *Riecke v. Westenhoff*, 10 Mo. App. 358.

The presumption will not be indulged where the deed is less than twenty years old. *England v. Hatch*, 80 Ala. 247.

Lapse of time will not cure a defective certificate relating to trusts. *Fell v. Young*, 63 Ill. 106.

⁶ *Applegate v. Lexington Mining Co.*, *supra*; s. c. 6 Sup. Ct. Repr. 742.

⁷ *Patterson v. Collier*, 75 Ga. 419.

⁸ *Brown v. Simpson*, 67 Tex. 225; s. c. 2 S. W. Repr. 644.

Where a deed had been recorded in a wrong county, a copy of the record could, by a party who had seen the original, be made to serve as an examined or sworn copy; and it being shown that the officer who took the acknowledgment and the clerk who recorded it were dead, and that the land had been claimed under the deed from its date (but

§96. Protocols, Testimonios, and Public Acts of Sale.

The system of titles in the early history of Texas, under the Mexican government, was essentially different from that which now prevails, and was similar, in some of its features to that in force in Louisiana. The protocol, or register of title issued by a commissioner, alcalde, or other officer of the government, constituted an archive of his office.¹ These protocols were afterward required to be archived in the general land office of Texas, and may be proved by a certified copy, without accounting for the testimonio,² which is a second original, issued to the grantee.³ A testimonio, to be admitted to record, must have due authentication attached, such authentication being the acknowledgment of his signature by the officer issuing it.⁴ Conveyances by public act before a judge or notary were included in the act of Dec. 20, 1836, and required to be proved and recorded.⁵ The omission to note the instrumental witnesses in an act of sale passed before a notary in 1835, did not render the instrument void.⁶ The office of assisting witnesses was to give to the signature and seal of the judge or alcalde who acted in the place of a notary, the force and effect which the seal and signature of the notary would have without witnesses.⁷ Copies of notarial acts were under the Mexican law regarded as originals.⁸ Under without actual possession), and that taxes had been paid, it was held that the execution of the deed was sufficiently proved. *Reid v. Howard*, 9 S. W. Repr. (Tex.), 106; and see *Shinn v. Hicks*, 68 Tex. 277; *s. c.* 4 S. W. Repr. 486.

¹ *Paschal v. Perez*, 7 Tex. 359.

² *Sheppard v. Harrison*, 54 Tex. 91.

³ *Blythe v. Houston*, 46 Tex. 67; *Titus v. Kimbro*, 8 Tex. 210; *McPhaul v. Lapsley*, 20 Wall. 264.

⁴ *Wood v. Welder*, 42 Tex. 397; *Hutchins v. Bacon*, 46 Tex. 409; *Fulton v. Bayne*, 18 Tex. 50. And is admissible in evidence as a recorded instrument under the statute. *Gainer v. Cotton*, 49 Tex. 101.

⁵ *Watson v. Chalk*, 11 Tex. 89.

⁶ *Cowan v. Williams*, 49 Tex. 381.

⁷ *Martin v. Parker*, 26 Tex. 253. The title was not invalid for want of the two witnesses of assistance. *Clay v. Holbert*, 14 Tex. 189; *Watrous v. McGrew*, 16 Tex. 503; *Ruis v. Chambers*, 15 Tex. 586.

⁸ *Titus v. Kimbro*, 8 Tex. 210.

the laws of Coahuila and Texas, in force in 1834, the signature of an officer before whom an instrument was executed, though not necessary to its validity, was essential to its character as a public or authentic act, capable of making proof of itself, without extrinsic evidence.¹

§97. Validation of Acknowledgments.

The subject of legislative validation of imperfect acknowledgments and records, has been already alluded to.² Statutes of this kind intended to cure formal defects and irregularities, are a constitutional exercise of legislative power,³ though retrospective in operation.⁴ They are not void as impairing the obligation of contracts,⁵ but are void in so far as they impair vested rights, or affect the rights of third persons not parties to the instrument validated.⁶

¹ *Andrews v. Marshall*, 26 Tex. 212.

The Act of 1839, in reference to recording, was applicable only to copies of instruments which at the date of the act remained in the public archives, and did not permit instruments then in private hands to be recorded on the faith of certificates made by officers of the pre-existing government. *Lambert v. Weir*, 27 Tex. 359.

For further cases on this subject, see *The State v. Sais*, 47 Tex. 309; *Byrne v. Fagan*, 16 Tex. 891; *Lee v. Wharton*, 11 Tex. 61; *Hatchett v. Connor*, 30 Tex. 104; *King v. Elson*, 30 Tex. 246; *Beatty v. Whitaker*, 23 Tex. 526; *Beaumont v. Preston*, 65 Tex. 448; *Jones v. Montes*, 15 Tex. 351; *Cavazos v. Trevino*, 35 Tex. 134; *State v. Cardinas*, 47 Tex. 251; *Word v. McKinney*, 25 Tex. 258; *Edward v. James*, 7 Tex. 375.

In Louisiana notarial titles were not required to be registered in the recorder's office prior to the Act of April 23d, 1853. *Parish Board v. Edrington*, 4 South. Repr. 574.

² *Ante*, §22. The statutes on the subject are numerous. See *Stimson's Am. Stat. Law*, §§1585, 1626, 6511.

³ *Cooley's Const. Lim.*, 462, 463; *Raverty v. Fridge*, 3 McLean, 230; *Doe v. Nelson*, *Id.* 383; *Johnson v. Taylor*, 60 Tex. 360; *Green v. Abraham*, 43 Ark. 420; *Green v. Weissenberg*, 57 Pa. St. 433; s. c. 98 Am. Dec. 237; *Baker v. Westcott* (Tex.), 11 S. W. Repr. 157; *Jones v. Richardson*, 44 Ark. 365, 473.

⁴ *Barton v. Morris*, 15 Ohio, 408; *Watson v. Mercer*, 8 Pet. 88; *Barnet v. Barnet*, 15 Serg. & R. 72; s. c. 16 Am. Dec. 516; *Hoskinson v. Adams*, 77 Mo. 537; *Howard v. Moox*, 64 N. Y. 262; *Foster v. Essex Bank*, 16 Mass. 245; *Buckley v. Earley*, 72 Iowa, 550; s. c. 33 N. W. Repr. 769; *Ross v. Worthington*, 11 Minn. 438; s. c. 88 Am. Dec. 95.

⁵ *Brinton v. Seevers*, 12 Iowa, 89.

⁶ *Cooley's Const. Lim.*, 472; *Grove v. Todd*, 41 Md. 633; s. c. 20 Am. Rep. 76; *Thompson v. Morgan*, 6 Minn. 292; *Green v. Drinker*, 7 Watts

The general rule is that statutes of this kind are remedial, and will be liberally construed.¹ Thus, although the statute only provided that deeds defectively recorded might be used in evidence, yet it was held to impart to the record the effect of notice from the date of the statute.² In some instances, however, a stricter construction has been applied. Thus, a statute of North Carolina validating certain records of deeds "which shall have been proved by one or more of the subscribing witnesses thereto," was held not to embrace a deed acknowledged by the grantor.³ Subsequent purchasers are bound to take notice of the operation of a validating statute.⁴ Such a statute will not take effect upon an acknowledgment as to which there has already been a judgment, although the case be still pending on appeal;⁵ nor upon a judgment;⁶ but it will operate upon an acknowledgment between the date of suit filed and the date of judgment.⁷

& S. 440; *Newman v. Samuels*, 17 Iowa, 528; *Southard v. Cent. R. Co.*, 26 N. J. L. 13; *Russell v. Rumsey*, 35 Ill. 362.

A statute providing that deeds theretofore made by husband and wife should not be held defective, because of "any informality or omission in the acknowledgment," was held unconstitutional. *Alabama Ins. Co. v. Boykin*, 38 Ala. 510. But where the certificate stated that the wife was examined "separate" from her husband, instead of "privily and apart," this was held cured by a validating statute. *McDannell v. Horrell*, 1 Tex. Un. Cas. 521. Even the explanation of the deed by the officer has been held but a matter of form. *Cox v. Gill*, 83 Ky. 669; *Dentzel v. Waldie*, 30 Cal. 193.

¹ *Butler v. Dunagan*, 19 Tex. 565; *Waters v. Spofford*, 58 Tex. 115; *Fogg v. Holcomb*, 64 Iowa, 621; s. c. 21 N. W. Repr. 111; *Carson v. Raisback*, 3 Wash. Ter. 168; s. c. 13 Pac. Repr. 618.

² *Fallass v. Pierce*, 30 Wis. 442.

³ *Denn v. Reid*, 10 Pet. 524.

⁴ *Journeay v. Gibson*, 56 Pa. St. 57.

⁵ *Wright v. Graham*, 42 Ark. 141; *Gaines v. Catron*, 1 Humph. 514; and see *Galt v. Dibrell*, 10 Yerg. 147.

⁶ *Ralston v. Moore*, 83 Ky. 571.

⁷ *Green v. Abraham*, 43 Ark. 420; *Johnson v. Richardson*, 44 Ark. 365.

For other cases on the subject of validation, see *post*, §120; *Stroud v. McDaniel*, 12 Lea, 617; *Shonk v. Brown*, 61 Pa. St. 320; *Blount v. Jansville*, 31 Wis. 648; *Rich v. Flanders*, 39 N. H. 304; *Dengenhart v. Cracraft*, 36 O. St. 549; *Nolan v. Grant*, 53 Iowa, 392; *Dentzel v. Waldie*, 30 Cal. 142; *Webb v. Den*, 17 How. 578.

Where each of two conflicting deeds of the same property was recorded on a defective acknowledgment, it was held that the effect of a subsequent validating act was to record both deeds at the same instant of time, and hence left them to operate as at common law, by which the one first executed would pass the title. *Deininger v. McConnell*, 41 Ill. 228. But for case where, under the operation of a validating statute, a deed was held as having been properly acknowledged and recorded originally, see *East v. Pugh*, 71 Iowa, 162; s. c. 32 N. W. Repr. 309. Defects of substance in the body of the deed, held not cured by a validating statute. *Arginsinger v. Cline*, 69 Iowa, 435.

The acknowledgment of a deed conveying land in Texas was made before a notary public in Ohio in 1841. At that date there was no law of Texas authorizing a notary public in one of the United States to take acknowledgment of deeds conveying lands in Texas. In 1874 an act was passed providing that instruments which had been properly acknowledged out of Texas, and in any state of the United States, before an officer authorized to take such acknowledgment by the laws *existing at the date of the act*, should be held to have been duly acknowledged, and that if also registered, they should be considered duly registered with the "full effects and consequence of existing laws." *Paschal's Dig.*, art. 7414a. By the law in force at the date of that act (1874), an acknowledgment taken before a notary public in another state was legal. *Pasch. Dig.*, art. 7418. *Held*, that the validating act cured the original defect of want of power in the notary, and also made valid the original registration. *Baker v. Westcott*, 73 Tex. 129, 131; s. c. 11 S. W. Repr. 157.

CHAPTER 4.

ACKNOWLEDGMENT BY MARRIED WOMEN.

- §98. Acknowledgment of married women.
- 99. Distinctive features of the law.
- 100. Modern changes in the law.
- 101. Early and later theories of the law.
- 102. Continued—The modern view.
- 103. The statutory requisites.
- 104. The separate examination.
- 105. Certifying the privy examination.
- 106. Explanation of the deed.
- 107. Certifying the explanation.
- 108. The voluntary execution.
- 109. Certifying the voluntary execution.
- 110. The wish not to retract.
- 111. Substantial compliance.
- 112. Joint certificates.
- 113. Identity of the wife.
- 114. Community property.
- 115. Relinquishment of dower.
- 116. Acknowledging deed with blanks.
- 117. Wife's power of attorney.
- 118. Wife acting as *feme sole*.
- 119. Re-acknowledgment and ratification.
- 120. Validating deeds of married women.
- 121. Impeachment of certificate by the wife.

§98. Acknowledgment of Married Women.

The object of requiring a separate examination with certificate thereof where a married woman acknowledges a deed, is said to be two-fold; not only to protect the wife from compulsion of the husband, or ignorance of the contents of the deed, but also to facilitate the conveyances of estates of married women, and to secure and perpetuate evidence upon which innocent grantees as well as subsequent purchasers may rely.¹ The only mode by which a

¹ *Hitz v. Jenks*, 123 U. S. 298; s. c. 8 Sup. Ct. Repr. 143, citing *Laurence v. Heister*, 3 Har. & J. 371, 377.

feme covert could, at common law, convey her real estate, was by uniting with her husband in levying a fine, which was a proceeding of record in a court.¹ The statutory provision is said to be an enlargement and not a restraint of her powers at common law. It facilitates her conveyance, because it authorizes a less formal mode than was known to the common law. But without the statutory acknowledgment it is held that her deed does not pass the title,² nor convey even an equitable title.³

§99. Distinctive Features of the Law.

It will be seen at once that the law relating to the acknowledgment of married women is radically different from that pertaining to ordinary acknowledgments. The manner of acknowledgment is different, and far more so the legal effect of a failure to comply fully with the law. A married woman's deed cannot be proved by witnesses.⁴ Statutes validating defective acknowledgments have been held not to cure defects pertaining to the separate examination, on the ground that the effect of such statutes would be to

¹ *Butler v. Buckingham*, 5 Day, 492; s. c. 5 Am. Dec. 174; *Sewall v. Haymaker*, 127 U. S. 719; *Morris v. Sargent*, 18 Iowa, 99; 2 Kent's Com. 151; *Prewett v. Graves*, 5 J. J. Marsh. 119.

² *Martin v. Dwelly*, 6 Wend. 9; s. c. 21 Am. Dec. 245; *Knight v. Paxton*, 124 U. S. 552; *Hogan v. Hogan*, 89 Ill. 427; *Kerr v. Russell*, 69 Ill. 666; s. c. 18 Am. Rep. 634; *Harrisonburg Bk. v. Paul*, 75 Va. 594; s. c. 40 Am. Rep. 740; *Belcher v. Weaver*, 46 Tex. 293; s. c. 26 Am. Rep. 267; *Gaffney v. Peeler*, 21 S. Car. 55; *Wingo v. Parker*, 19 S. Car. 13; *Jefferson Co. v. Heil*, 81 Ky. 229; *Johnston v. Wallace*, 53 Miss. 331; s. c. 24 Am. Rep. 699; *Den v. Lewis*, 8 Ired. 70; s. c. 47 Am. Dec. 338; *Mason v. Brock*, 12 Ill. 273; s. c. 52 Am. Dec. 490; *Wamble v. Foote*, 2 Dak. 1; s. c. 2 N. W. Repr. 239; *Grove v. Todd*, 41 Md. 633; s. c. 20 Am. Rep. 76; *Davis v. Agnew*, 67 Tex. 206; s. c. 2 S. W. Repr. 43, 376; *Gregory v. Ford*, 5 B. Mon. 471; *Muir v. Galloway*, 61 Cal. 498; *Pikens v. Knisely*, 29 W. Va. 1; s. c. 6 Am. St. Rep. 622.

³ *Bagby v. Emberson*, 79 Mo. 179; *contra*, *Homeopathic Co. v. Marshall*, 32 N. J. Eq. 106. In Virginia and Ohio her deed does not convey title until recorded. *Sewall v. Haymaker*, 127 U. S. 719; *Rorer v. Roanoke Bank*, 83 Va. 589; s. c. 4 S. E. Repr. 720, 731; *Harkins v. Forsythe*, 9 Leigh, 301; *Ludlow v. O'Neil*, 29 O. St. 1813; *Pickens v. Knisely*, 29 W. Va. 1; s. c. 6 Am. St. Rep. 622.

⁴ *Steele v. Lewis*, 1 Mon. 49; *Berry v. Donley*, 26 Tex. 737, 739; *Simpson v. Simpson*, 93 N. C. 373; *Dawson v. Shirley*, 6 Blackf. 531.

divest the title itself, and to impair vested rights.¹ The presumptions of law and the rules of construction are different. Thus, a grantor at whose instance the officer takes and certifies an acknowledgment is ordinarily estopped to deny his own act because of irregularities of manner.² But a married woman cannot be presumed to appear before the officer for the purpose of making an acknowledgment, but rather to have the deed explained to her, *after* which she may, or may not, desire to acknowledge it. The courts have said that for them to hold a married woman estopped to deny her conveyance by reason of acts and conduct of hers, would be to practically supersede the legislative method, and to allow her estate to be divested in a manner which the statute had not authorized.³ Therefore the doctrine of estoppel cannot be invoked against her on such grounds as are ordinarily sufficient against persons *sui juris*;⁴ and that she understood the deed perfectly, and signed it willingly, and received and appropriated the proceeds of sale, and for a long time remained silent and acquiescent, knowingly permitting the vendee to make valuable improvements on the land—has been held to fall short of that positive and affirmative fraud on her part by which she would be estopped.⁵

¹ Alabama Ins. Co. v. Boykin, 38 Ala. 510. A deed made by a woman while *sole* cannot be recorded after her marriage without a separate, privy acknowledgment. Johnson v. Walton, 1 Sneed, 258.

² Jackson v. Colden, 4 Cow. 266.

³ Berry v. Donley, *supra*; Johnson v. Bryan, 62 Tex. 623; Oglesby Coal Co. v. Pasco, 79 Ill. 170; Drury v. Foster, 2 Wall. 24.

⁴ Lowell v. Daniels, 2 Gray, 161; Williams v. Baker, 71 Pa. St. 476; Merriam v. Boston R. R., 117 Mass. 241; Rumfelt v. Clemens, 10 Wright, 455; McBeth v. Trabue, 69 Mo. 642; Upshaw v. Gibson, 53 Miss. 341.

⁵ Berry v. Donley, *supra*; and see Huffman v. Huffman, 118 Pa. St. 458; s. c. 12 Atl. Repr. 308.

The leading doctrine that actual notice supplies registration was by the courts of equity engrafted on the registry statute at an early day, not so much because the terms of the statute warranted the construction given it—although the use of the word “secret” in the act was availed of for that purpose—as because the principles of *equity* demanded it. Le Neve v. Le Neve, 1 Ves. 64; *ante*, §1. The American courts are

§100. Modern Changes in the Law.

The malign influence of the husband, who seems by the law to be regarded as the principal and inveterate enemy of the wife, may be such as to justly entitle her to some measure of protection. Yet when that intended protection has been carried to the extent indicated—an extent repugnant to equity, and such as affords a most inviting and convenient occasion for the perpetration of fraud,¹ a change in the law may reasonably be expected to follow. What has been said in the preceding sections of this chapter must be understood as a statement of the law as it formerly existed, and as it now exists in only those states where a separate examination is still required. The law on this subject has been undergoing a steady legislative change, until now, in one-half the states and territories, a married woman may convey as if she were *sole*, and her acknowledgment may be

much divided on the subject of the law of married women, and as to how far the powers of a court of equity may extend as against her. A recent eminent law writer states that the tendency of modern authority is strongly towards the enforcement of the rule of estoppel against married women as against persons *sui juris*; and that where statutes have enabled married women to enter into contracts as though single, there is no reason why estoppel should not apply to them without any limitation. 2 Pomeroy's Eq. Jurisprudence, §814, citing *Dingens v. Clancey*, 56 Barb. 566; *Fryer v. Rishell*, 84 Pa. St. 521; *Towels v. Fisher*, 77 N. C. 437; *Godfrey v. Thornton*, 46 Wis. 677; *Hockett v. Baily*, 86 Ill. 74; *Bigelow v. Foss*, 59 Me. 162; *Frasier v. Gelston*, 35 Md. 298; *Brinkerhoff v. Brinkerhoff*, 23 N. J. Eq. 477, 483; *Drake v. Glover*, 30 Ala. 382; *Connolly v. Branstler*, 3 Bush, 702; *McCaa v. Wolf*, 42 Ala. 389; *Couch v. Sutton*, 1 Grant's Cas. 114; and see *Homeopathic Co. v. Marshall*, 32 N. J. Eq. (5 Stew.), 106; *Crenshaw v. Julian*, 26 S. Car. 283; s. c. 4 Am. St. Rep. 719; 2 S. E. Repr. 133.

¹ "I am unwilling," said Judge Hitchcock, in an opinion holding that a certificate sufficiently showed the voluntary assent of the wife, although it did not use the statutory terms "to adopt any rule of construction, or to recognize as principle a law which will encourage any portion of the community, whether male or female, in fraud or dishonesty." And continuing, he says that it would shake the titles to millions of property that had been acquired by fair and *bona fide* purchase, and in the conveyance of which the wife had done all that she could do to make it effective. *Ruffner v. McLenan*, 16 Ohio. 639. If all courts adopted such a rule of construction as was applied by the court in this case, the danger and opportunity of fraud would be greatly lessened; but unfortunately a much narrower construction often prevails.

made in the ordinary form.¹ At common law the civil disability of a married woman was complete; she had no power to contract, and her civil existence was considered as merged in that of the husband.² She was presumed to be under his coercion and control, and it is more than probable that during the barbarism of centuries past this presumption rested upon a very substantial basis of fact. It was appropriate at that time, and consistent with the state of affairs and of the law then existing, that for her protection the courts should require that her conveyance should

¹ In the following states and territories, a separate acknowledgment is not now required in conveying the wife's separate property. Alabama, §2158, Code of 1876; Comp. Laws Ariz. Ter. (1877), §2246, (2); Miller v. Fish, 1 Ariz. 232 and 243; Colorado, §2278, Gen. Stats. of 1883; Connecticut, Gen. Stats. 1888, §2796; Appeal of Spitz, 56 Conn. 184; 14 Atl. Repr. 776; Dakota; Georgia, Brown v. Kimbrough, 55 Ga. 41; Illinois, §19, ch. 30, Hurd's Rev. Stats. of 1883; Bradshaw v. Atkins, 110 Ill. 323, 329; Indiana, §2938, Rev. Stats. of 1881; Iowa, §1935, Rev. Code of 1873; Kansas; Maine, Allen v. Hooper, 50 Me. 371; Maryland, §79, ch. 44, Rev. Code of 1878; Morris v. Harris, 9 Gill, 19; Massachusetts, White v. Graves, 107 Mass. 325; s. c. 9 Am. Rep. 38; Michigan, Watson v. Thurber, 11 Mich. 457; Minnesota; Mississippi, §1193, Code of 1880; Nebraska, Hale v. Christy, 8 Neb. 264; New Hampshire; New York, Cashman v. Henry, 75 N. Y. 103; Utah; Vermont; Wisconsin, §2224, Rev. Stats. 1878; Hayes v. Frey, 54 Wis. 503; s. c. 11 N. W. Repr. 695; Wyoming, §2, Rev. Stats. of 1887, and South Carolina. In a few instances, such separate acknowledgment is required where the conveyance is of the homestead, Code of Ala., §2882; or of dower, Gen. Stats. of S. C. §1797. In three states that require a privy examination, it is also provided that acknowledgments taken without the state may be made and certified in accordance with the law of the state where taken. See *ante*, §9; *post*, §393.

² "The doctrine of the incapacity of the *feme covert*, as it exists at common law, can claim such merit as, even in error and wrong, may be attributable to systematic consistency and uniformity. If it be irrational and barbarous, it harmonizes and is in consonance with, and is the result of, rules equally unreasonable and equally tinged with the reading of the dark ages. It is the legitimate inference from the portentous doctrine, that during coverture the separate legal existence of the wife is extinguished; or in other words, that her reason, faculties and intelligence are entombed, while from her legal tomb her husband gains an accession of power, dignity, and rights." Jones v. Taylor, 7 Tex. 240, 246. And see, 2 Black. Com. 291, 292; Baxter v. Bodkin, 25 Ind. 172; Dow v. Jewell, 18 N. H. 340; Martin v. Dwelly, 6 Wend. 9; s. c. 21 Am. Dec. 245; Lowell v. Daniels, 2 Gray, 161; Davis v. Andrews, 30 Vt. 681; Lindley v. Smith, 46 Ill. 523; Thayer v. Torrey, 37 N. J. L. 339; Goff v. Roberts, 72 Mo. 570.

be by the process of fine and recovery, involving a privy examination as to her freedom of action. For the sake of convenience this privy examination is now authorized to be made by an officer out of court, instead of in court, as formerly, but so slight a change of form does not justify the retention of this relic of barbaric ages at a time when it is no longer consistent with the wife's recognized civil *status*, and the rights of property to which she is under the law entitled. The right of unrestricted acquisition, ownership and enjoyment of property, is separable from the right and power of its unrestricted disposition only by the arbitrary force of law.

§101. The Early and Later Theories of the Law.

Aside from the almost entire removal of the disabilities of married women by the statutes of many of the states, the tendency of recent decisions of the courts is towards a much broader and more reasonable construction of the law on this subject than at first prevailed. From the absolute void of the wife's civil non-entity at common law,¹ to an almost full recognition of her natural right to own, enjoy and convey property as any other person, with the powers and liabilities logically incident to ownership, legislation and judicial decision have slowly and gradually advanced for more than a century past. The difficulties and inconsistencies into which the courts have frequently fallen may be justly attributed to an undue conservatism leading them too often to look backward instead of forward, and thus to misconstrue the purpose and spirit of the advancing law. In the fine and recovery at common law, the title of the *feme covert* passed by virtue of the judgment of court;² the privy

¹ 2 Blackstone's Com. 293; 2 Kent's Com. 151; *Morris v. Sargent*, 18 Iowa, 99; *Prewett v. Graves*, 5 J. J. Marsh, 119; *Jones v. Taylor*, 7 Tex. 240.

² "It is the judgment of the court that gives life and effect to the fine; until the court acts, there is no right transferred; after it has acted, the right is vested. The acknowledgment of the deed by a party is but evidence of that which was previously done, and from the doing of which,

examination to guard her against the presumed coercion of the husband being but an incident of the proceeding. Afterwards the statute abolished fines and recoveries,¹ and conferred upon the wife the power to convey by deed, the title to be passed by virtue of that instrument instead of the judgment of the court. The incident of a privy examination was, however, continued in force, the continued protection of the wife being a matter distinct from, and not necessarily inconsistent with, the power to convey thus conferred upon her. Then the question came before the courts, in cases where there had been a failure to comply fully with the statute in respect to the privy examination, as to the force and effect to be given to this requirement.² Looking back for a rule of construction to the law as it aforetime was, when the wife had no power to convey at all, the courts decided that the matter of the privy examination was an absolute qualification and limitation of the statutory grant of power; an essential part of the transfer of title, and not an incident. They decided that the main design of these enabling acts was to protect the property rights of the wife, rather than to confer upon her a power,³

and not the acknowledgment of having done it, all its force and effect upon the party is produced." *Milner v. Turner's Heirs*, 4 Mon. 240, 246; and see *Woodbourne v. Gorrell*, 66 N. C. 82.

¹ 3 and 4 Wm. IV, ch. 74; 4 Kent's Com. 51, 52; Williams on Real Prop., 213, 214; Martindale on Conv., §182.

² When the common law dogmas were to be invaded * * * the better policy would have been to abrogate the wife's common law incapacities entirely * * * and to have carried the legal reform to its logical result. 3 Pomeroy's Eq. Juris., §1126.

³ *Jones v. Crossthwaite*, 17 Iowa, 393, citing *Benton v. Beer*, 35 Barb. 78; *Howe v. Wildes*, 34 Me. 566; *Rodemeyer v. Rodman*, 5 Iowa, 426; *White v. Wager*, 25 N. Y. 328.

So, it has been held that the deed of a woman made while *sole* cannot be recorded after her marriage without separate acknowledgment. *Johnson v. Walton*, 1 Sneed, 258; and the joinder of the husband at that time could as well have been also required, since the wife's deed, without his acknowledgment, is held ineffectual. *Ludlow v. O'Neil*, 29 O. St. 181, and his acknowledgment cannot be made after her death, though the deed was delivered in her lifetime. *Sewall v. Haymaker*, 127 U. S. 719; s. c. 8 Sup. Ct. Repr. 1348; *Rorer v. Roanoke Bk.*, 83 Va. 589; s. c. 4 S. E. Repr. 720.

although the protection of the court in the process of fine and recovery must have been more effectual than that afforded by a privy examination before inferior and merely ministerial officers. They held that the privy examination and due certificate thereof were absolutely essential to the validity of the deed;¹ that these things were the essence and foundation of the deed;² that it was not the fact of the privy examination merely, but the recording of the fact that made the deed effectual to pass the estate of a *feme covert*;³ that until her acknowledgment is duly made and certified, the title does not pass,⁴ not even an equitable title;⁵ that the instrument in such case is as destitute of vitality as so much blank paper,⁶ and that no acts of the wife in connection with such deed, not amounting to positive, affirmative fraud on her part, can create an estoppel against her so as to give it effect.⁷

Such strict construction does not, however, obtain in all cases. Thus the Gen. Stats. of Ky., ch. 81, §17, allow the certificate of acknowledgment to be impeached for fraud, "or mistake on the part of the officer;" and it was held that the mistake contemplated by the statute did not apply to the form and manner of taking a married woman's acknowledgment, and the certificate being regular on its face, parol proof was not admissible to show that the husband was present, and that the officer failed to explain the deed to the wife. *Cox v. Gill*, 83 Ky. 669.

¹ *Goodenough v. Warren*, 5 Saw. 494; *McCormack v. Woods*, 14 Bush, 78; *Bank of Healdsburg v. Baillhache*, 65 Cal. 406; s. c. 4 Pac. Repr. 106; *Davis v. Agnew*, 67 Tex. 206; s. c. 2 S. W. Repr. 43, 376.

² *Cross v. Evarts*, 28 Tex. 502.

³ *Elliott v. Peirsol*, 1 Pet. 328, 339; *Sewall v. Haymaker*, 127 U. S. 719.

⁴ *Mason v. Brock*, 12 Ill. 273; s. c. 52 Am. Dec. 490; *Looney v. Adamson*, 48 Tex. 621; *Knight v. Paxton*, 124 U. S. 552; *Harkins v. Forsythe*, 9 Leigh, 301; and numerous cases cited in note 2, §98, *ante*.

⁵ *Bagby v. Emberson*, 79 Mo. 139.

⁶ *Mariner v. Saunders*, 5 Gilm. 113; *Drury v. Foster*, 2 Wall. 24.

⁷ *Berry v. Donley*, 26 Tex. 746; *Lowells v. Daniels*, 2 Gray, 161; *Williams v. Baker*, 71 Pa. St. 476; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Miller v. Shackelford*, 3 Dana, 299; *McBeth v. Trabue*, 69 Mo. 642.

An action of ejectment against a naked trespasser will be defeated by a defective married woman's acknowledgment in the owner's chain of title, and no proof of proper acknowledgment or execution of the deed, even if available, can supply the defect. That such fatal effect should be given to an irregularity of this kind, does not seem to have been at first contemplated. See head-note to *Fisk v. Miller*, 13 Tex. 226; also

§102. Continued—The Modern View.

The courts, however, in many cases where directly confronted with the injustice and absurdities arising from a practical application of these irrational doctrines, have revolted at the consequences, and again and again have refused to stand by the logical results and effect of the rules declared, and thus have involved themselves in numberless contradictions that judicial ingenuity cannot reconcile nor explain away. They have held that a wife's defectively acknowledged deed, otherwise styled blank paper, may by slight acts of her's as widow, be confirmed and so made effectual to convey full title;¹ that where the wife is a party litigant and fails to make objection at the trial to the introduction in evidence of her defectively certified deed, that this blank paper will thereupon support a verdict for title in favor of the grantee;² that her bond for title without any privy examination whatever may be enforced by the courts;³ that such bond conveys an equitable title, that will in a proper state of facts prevail over the legal title;⁴ that the statute does *not* declare void any other mode of conveyance by her than that prescribed;⁵ that she may be estopped by acts otherwise than affirmatively fraudulent,⁶ and that her deed with defective acknowledgment may be validated by subsequent

McKinney v. Matthews (Tex.), 6 S. W. Repr. 793, and 10 N. E. Repr. 647.

¹ O'Keefe v. Handy, 31 La. Ann. 832; Carter v. Strapham, Cowp. 201; *post*, §119.

² Urquhart v. Womack, 53 Tex. 616. And constitutes color of title. Perry v. Perry, 99 N. C. 270; 6 S. E. Repr. 86.

³ Clayton v. Frazier, 33 Tex. 92; and see Homeopathic Co. v. Marshall, 32 N. J. Eq. (5 Stew.), 106.

⁴ Dalton v. Rust, 22 Tex. 134.

⁵ Womack v. Womack, 8 Tex. 397.

⁶ Dalton v. Rust, *supra*. The tendency of modern decision is to enforce estoppel against married women as against persons *sui juris*, even independently of legislation freeing their estates from all interest and control of the husband. 2 Pomeroy's Eq. Juris., §814, citing Bigelow v. Farr, 59 Me. 162; Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. 477; Drake v. Glover, 30 Ala. 382; Connolly v. Branstler, 3 Bush, 702; McCullough v. Wilson, 9 Harris, 436.

legislation without impairing vested rights, for the reason that these matters of the acknowledgment are but mere formalities.¹

§103. The Statutory Requisites.

The statutes that yet provide for a separate acknowledgment usually include these requisites—that the wife shall be examined separate and apart from her husband; that the instrument shall be explained to her; that she shall acknowledge its voluntary execution; and that she still assents to it, or does not wish to retract it. The statutes are not uniform in requiring each and all of these, especially the last one.² These matters constitute the married woman's acknowledgment, as distinguished from ordinary acknowledgments; and the omission of any one of them, when required by the statute, is fatal to the deed.³ In a few cases there has been shown a disposition on the part of the courts towards such a construction, in favor of the sufficiency and legality of the acknowledgment, as might ordinarily prevail in other matters of this general character;⁴ but it may be

The mortgage of a married woman without any acknowledgment has been enforced against her in equity. See *Homeopathic Co. v. Marshall*, 32 N. J. Eq. (5 Stew.), 106.

¹ *Dentzel v. Waldie*, 30 Cal. 193; *Watson v. Mercer*, 8 Pet. 88; *Barnett v. Barnett*, 15 Serg. & R. 72; s. c. 16 Am. Dec. 518; *Mercer v. Watson*, 1 Watts, 330; *Dulaney v. Tilghman*, 6 Gill & J. 461; *Lycoming v. Union Bank*, 15 Pa. St. 171; *Watson v. Bailey*, 1 Binn. 476; *Webb v. Den*, 17 How. 577; *Cox v. Gill*, 83 Ky. 669; *Goshorn v. Purcell*, 11 O. St. 641; *post*, §120.

² This last clause is found in the statutes of Rhode Island, Virginia, West Virginia, Texas, California, Nevada, Idaho, Montana, and District of Columbia. In Kentucky she "consents that the same may be recorded." In Ohio she must be "still satisfied therewith as her act and deed."

³ *Garrett v. Moss*, 22 Ill. 363; *Ward v. McIntosh*, 12 O. St. 231.

⁴ *Martin v. Davidson*, 3 Bush, 574; *Gregory v. Ford*, 5 B. Mon. 481; *Stevens v. Doe*, 6 Blackf. 475; *Ruffner v. McLennan*, 16 Ohio, 639; *Coleman v. Billings*, 89 Ill. 183; *Jordan v. Corey*, 2 Ind. 386; s. c. 52 Am. Dec. 516; *Allen v. Reynolds*, 35 N. Y. (4 Jones), 297; *Russell v. Whitesides*, 4 Scam. 7; *Fleming v. Potter*, 14 Ind. 486. "Though it is not expressly stated in the certificate that the effect of the deed was explained to her, or that she declared that she had delivered it, or consented that it might be recorded, each of these facts is clearly implied from its state-

regarded as the settled law, resulting as a logical sequence of the prevailing construction adopted by the courts, that a full and specific, though not always a literal, compliance with the statute will be required, both in the taking and in the certification of the acknowledgment.

§104. The Separate Examination.

The leading idea in the requirement that the wife shall be separately or privily examined, is that she shall be thereby removed from the presence and influence of the husband. He should be so far away that he cannot see or hear any indication of unwillingness on her part,¹ nor communicate to her by word, look or motion.² But although the statute use the term "private examination," it does not necessarily exclude all other persons besides the husband. The examination is sufficiently private if he is excluded.³ The officer must himself make the examination; he cannot do so by attorney.⁴ In a case where it is necessary, however, the examination may be made through an interpreter, who

ments." *Martin v. Davidson*, *supra*; and see also, *Whitehurst v. Hunter*, 2 Hayw. 401.

¹ *McCandless v. Engle*, 51 Pa. St. 309.

² *Belo v. Mayes*, 79 Mo. 67.

A certificate is not successfully impeached by the testimony of the husband and wife that the husband remained in the clerk's office while the privy examination was taken, the husband stating that he does not remember whether he was out of hearing or not, and the wife being silent on this point, and saying that she signed the deed and acknowledged it. *Grotenkemper v. Carver*, 10 Lea, 280. Where the deed was read and explained to the husband and wife together, in a room fourteen feet square, after which the wife went out to get the notary a drink of water, and on her return he met her at the door, and standing just inside, asked her, as she was about to step in, if she signed freely, etc.; *held*, not a private examination. *Webb v. Webb*, 87 Mo. 540.

³ *Love v. Taylor*, 26 Miss. 567; *Dennis v. Tarpenny*, 20 Barb. 371; *Thayer v. Torrey*, 37 N. J. L. 339. A contrary rule is announced in *Warren v. Brown*, 25 Miss. 66; s. c. 57 Am. Dec. 191, which is overruled by *Love v. Taylor*, *supra*. See 1 Devlin on Deeds, §§552, 553; *Den v. Geiger*, 4 Halst. 233; *Nanty v. Bailey*, 3 Dana, 111.

⁴ *Dawson v. Shirley*, 6 Blackf. 531. If the law require the examination to be made by two officers, one alone is not sufficient. *Malloy v. Bruden*, 88 N. C. 305.

should be sworn.¹ The examination and explanation of the deed must precede the acknowledgment.²

§105. Certifying the Privy Examination.

Unless the certificate shows the separate examination, it is fatally defective.³ Some statutes require the examination to be "out of the presence" of the husband, and others, "out of the hearing;" and it is usually held that either of these expressions will, in the certificate, answer for the other;⁴ and even the omission of these words has been held not to vitiate where the certificate stated the examination to have been separate and apart from the husband.⁵ Where the statutory expression is "separate and apart" from the husband, the use of either one of these words has, in some instances, been held sufficient,⁶ and in others not sufficient.⁷

¹ Norton v. Meader, 4 Saw. 603; DeArnaz v. Escandon, 59 Cal. 486; Walter v. Weaver, 57 Tex. 569; Chestnut v. Shane, 16 Ohio, 599. *Contra*, Dewey v. Campau, 4 Mich. 565.

² Watson v. Michael, 21 W. Va. 568; Laidley v. Knight, 23 W. Va. 735. Signing and acknowledging a deed of her separate property by a married woman is not effectual to convey her title when her name does not appear in the body of the instrument, and there is nothing to show that the husband, who is the sole grantor, is a married man. Bradley v. Mo. P. Ry. Co., 91 Mo. 493; s. c. 4 S. W. Repr. 427.

³ Jourdan v. Jourdan, 9 Serg. & R. 268; s. c. 11 Am. Dec. 724; Watson v. Bailey, 1 Binn. 470; s. c. 2 Am. Dec. 462; Laughlin v. Tream, 14 W. Va. 322; Kendall v. Miller, 9 Cal. 591; Clayton v. Rose, 87 N. C. 106; Edgerton v. Jones, 10 Minn. 427; Marsh v. Mitchell, 26 N. J. Eq. 497; Bagby v. Emberson, 79 Mo. 139; First Nat'l Bank v. Paul, 75 Va. 594; s. c. 40 Am. Rep. 740; Willis v. Gattman, 53 Miss. 721; Pratt v. Battels, 28 Vt. 685; Graham v. Long, 65 Pa. St. 386; Stillwell v. Adams, 29 Ark. 346; Hartley v. Ferrell, 9 Fla. 374; Harty v. Ladd, 3 Or. 353; Phillips v. Green, 3 A. K. Marsh. 7; s. c. 13 Am. Dec. 124. Under the Kentucky statute, where the acknowledgment is before a clerk in that state, the separate examination need not be certified. Dowell v. Mitchell, 82 Ky. 47.

⁴ Deery v. Cray, 5 Wall. 795; Nippel v. Hammond, 4 Colo. 211.

⁵ Pardun v. Dobesberger, 3 Ind. 389; Webster v. Hall, 2 Har. & McH. 19; s. c. 1 Am. Dec. 370.

⁶ Belo v. Mayes, 79 Mo. 67.

⁷ Dewey v. Campau, 4 Mich. 565. But the word "apart" held not equivalent to "out of hearing." Butterfield v. Beale, 3 Ind. 203.

Where it is necessary, the explanation of the deed may be made through a sworn interpreter.

§106. Explanation of the Deed.

The object of requiring the officer to explain the contents of the instrument to the wife is to prevent the conveyance from being obtained by deceit or misrepresentation of the husband.¹ A full knowledge on her part of the contents of the deed is one of the principal objects to be attained by the private examination. If she is misinformed as to its contents, the conveyance is of no avail against her; and if the deed has been changed in an important particular after her acknowledgment has been taken, she cannot be compelled to abide by the altered instrument.² It is not sufficient for the officer to merely read the deed to the woman.³ The explanation has been held not necessary where it sufficiently and certainly appears to the officer that the wife already correctly understands the contents and effect of the instrument;⁴ and where the statute does not require the officer himself to make the explanation, it will suffice that she is made acquainted with the contents by any person.⁵ It is held that by the terms of some of the statutes the explanation need not be private. Usually, however, this matter constitutes a part of the privy examination.⁶

Statement in the certificate of a "private examination," held to suffice for "privily and apart from her husband." *Skinner v. Fletcher*, 1 Ired. 313. "Separate and apart," held to suffice for "privily and apart." *Coombes v. Thomas*, 57 Tex. 321.

¹ *Pease v. Barbiers*, 10 Cal. 436; *Hitz v. Jenks*, 123 U. S. 298; *Langton v. Marshall*, 59 Tex. 296.

² *Cole v. Bammel*, 62 Tex. 108; and see *Roney v. Moss*, 76 Ala. 491.

³ *Watson v. Michael*, 21 W. Va. 568; *Chestnut v. Shane*, 16 Ohio, 599.

⁴ *Drew v. Arnold*, 85 Mo. 126; *Chauvin v. Wagner*, 18 Mo. 541; *McIntyre v. Ward*, 5 Binn. 301; *Talbot v. Simpson*, 1 Pet. C. C. 188; *Schley v. Pullman Co.* 7 Supt. Ct. Repr. 730; 120 U. S. 575.

⁵ *Jansen v. McCahill*, 22 Cal. 563; *French Bank v. Beard*, 54 Cal. 480.

⁶ *Webb v. Webb*, 87 Mo. 510; *Ray v. Crouch*, 10 Mo. App. 321; *Moorman v. Board*, 11 Bush, 185.

In Tennessee the statute requires the certificate of a married woman's acknowledgment to show that she executed the deed "under-

§107. Certifying the Explanation.

The certificate is invalid if it fails to show the requisite explanation of the deed to the wife.¹ It is not sufficient for the officer to certify that she "declared that she fully understood the contents of said deed;" she might be mistaken in her understanding of it.² Where the statute requires the officer to make the explanation, the certificate must show that it was made by him;³ otherwise it is sufficient to state generally that the explanation was made, or that the wife was made acquainted with the contents of the instrument.⁴

A statement in the certificate that the officer made the wife acquainted with the contents of the instrument has recently been held sufficient in California, although the deed stated that it was subject to conditions contained in another instrument not signed by her, and not then executed, the contents whereof were unknown to the officer.⁵

standingly," and that is an indispensable requisite, though that precise word need not be used. *Anderson v. Bewley*, 11 Heisk. 29; *Wright v. Duffield*, 2 Baxt. (58 Tenn.), 218.

Norton v. Meader, 4 Lawy. 603, 625; *Harrison v. Oakman*, 56 Mich. 390; *De Arnaz v. Escandon*, 59 Cal. 486; *Walter v. Weaver*, 57 Tex. 569; *Chestnut v. Shane*, 16 Ohio, 599; 1 Dev. on Deeds, §§537, 538.

¹ *Bolling v. Teel*, 76 Va. 487; *Paine v. Baker*, 15 R. I. 100; s. c. 1 N. Eng. Repr. 153; *Ruleman v. Pritchett*, 56 Tex. 482; *Bateman's Petition*, 11 R. I. 393; *Barnet v. Barnet*, 15 Serg. & R. 72; s. c. 16 Am. Dec. 516; *Roney v. Moss*, 76 Ala. 491; *Burkitt v. Scarborough*, 59 Tex. 495; *Bagby v. Emberson*, 79 Mo. 139; *Hutchinson v. Ainsworth*, 63 Cal. 286; *Johnson v. Bryan*, 62 Tex. 623; *O'Ferrall v. Simplot*, 4 Iowa, 381.

² *Langton v. Marshall*, 59 Tex. 296; but see *contra*, *Thomas v. Meir*, 18 Mo. 573.

³ *Rice v. Peacock*, 37 Tex. 392.

⁴ *Thomas v. Meir*, *supra*; *Talbot v. Simpson*, 1 Pet. C. Ct. 188; *Kavanaugh v. Day*, 10 R. I. 393; *Martin v. Davidson*, 3 Bush. 572; *Hughes v. Lane*, 11 Ill. 123; *Nippel v. Hammond*, 4 Colo. 211.

⁵ *Bull v. Coe* (Cal.), 18 Pac. Repr. 808.

Under some of the statutes it has been held not necessary for the officer to certify that he had made the explanation. *Stevens v. Doe*, 6 Blackf. 475; *Gregory v. Ford*, 5 B. Mon. 471; *Chestnut v. Shane*, 16 Ohio, 599.

Where the certificate showed that the explanation was before the privy examination, it was held fatally defective. *Watson v. Michael*, 21 W. Va. 568; *Laidley v. Knight*, 23 *Id.* 735.

§108. The Voluntary Execution.

The separate examination is intended to secure to the wife the free exercise of her will in the execution or rejection of the deed.¹ Evidence of duress on the part of the husband, in order to successfully impeach a certificate showing a voluntary execution, must be clear and well corroborated, especially if it relate to matters occurring in the privacy of domestic life.² A threat by the husband to poison himself does not constitute duress;³ and it has been held that a threat to arrest the husband, who had committed a crime, is not duress as regards the wife.⁴

The voluntary assent must be affirmatively expressed. The several statutes use a greater variety of terms for the expression of the wife's consent than in relation to any other matter connected with her acknowledgment,⁵ and as a result a great number of cases have arisen in which the courts have been called on to construe equivalent expressions, and to determine what will constitute a substantial compliance with the statute on this point. Where the statute uses an unnecessary number of words and terms of sim-

Where the certificate stated that the contents of the deed "were made fully to her," the omission of "known" was held not to vitiate. *Hornbeck v. Building Association*, 88 Pa. St. 64.

A statement in the certificate that the wife declared that she executed the deed freely and understandingly, held not to supply the want of explanation. *Ruleman v. Pritchett*, 56 Tex. 482.

¹ *Moorman v. Board*, 11 Bush, 140; *Mount v. Kesterson*, 6 Coldw. 452.

² *Ins. Co. v. Nelson*, 103 U. S. 544; *Smith v. Allis*, 52 Wis. 337; *Smith v. McGuire*, 67 Ala. 34.

³ *Wright v. Remington*, 41 N. J. L. 48; s. c. 32 Am. Rep. 180; but compare *Eadie v. Slimmon*, 26 N. Y. 9.

⁴ *Compton v. Bunker Hill Bank*, 96 Ill. 301; s. c. 36 Am. Rep. 147.

⁵ The terms most commonly employed, are "willingly" (Tex.; Va.; Wash. Ter.; D. C.); "freely" (Dak.); "freely, without fear, coercion or compulsion" (Oregon); "willingly, without compulsion or threats or fear of her husbands displeasure" (Del.); "of her own free will, without compulsion or undue influence of her husband" (Ark.); "of her own free will and accord, and without fear, constraints, or threats on the part of her husband" (Ala.); "freely and voluntarily" (Ky.; La.); "freely and voluntarily, without any compulsion or the illicit influence of her husband" (N. M.); "voluntarily" (Ohio); "her voluntary act and deed" (R. I.).

ilar import, as, "her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband," the omission of one or more of the prescribed terms has usually been held not to vitiate, for the reason that the others sufficiently express the voluntary assent.¹ The decisions, however, are not uniform; and the omission of the words "fear" and "ill-usage," in such connection, has been held fatal on the ground that the courts have no right to dispense with what the statute has required.² "Without fear, constraint or threat," has been held sufficient for "without fear, constraints or threats," as found in the Alabama statute.³

§109. Certifying the Voluntary Execution.

A failure to show the voluntary execution is fatal to the certificate.⁴ It is not necessary, however, for the certificate to state that the wife comes before the officer voluntarily.⁵

¹ *Tubbs v. Gatewood*, 26 Ark. 128; *Webster v. Hall*, 2 Har. & McH. 19; s. c. 1 Am. Dec. 370; *Battin v. Bigelow*, 1 Pet. C. C. 452; *Ruffner v. McLenan*, 16 Ohio, 639; *Dengenhart v. Cracraft*, 36 O. St. 549; *Den v. Geiger*, 4 Halst. (9 N. J. L.), 225; *Devlin on Deeds*, §568; *Brown v. Farron*, 3 Ohio, 140; *Goode v. Smith*, 13 Cal. 81.

² *Laird v. Scott*, 5 Heisk. 314; *Hawkins v. Burrell*, 1 Har. & J. 513; *Boykin v. Rain*, 28 Ala. 332; s. c. 65 Am. Dec. 349; *Bright v. Boyd*, 1 Story, 486; 1 Story Eq., §97. 117; *Alabama v. Boykin*, 38 Ala. 510; *Hollingsworth v. McDonald*, 2 Har. & J. 230; s. c. 3 Am. Dec. 545; *Henderson v. Rice*, 1 Coldw. 223.

Use of the words "freely and of her own accord," in lieu of "as her voluntary act and deed," held sufficient. *Dundas v. Hitchcock*, 12 How. 256.

Where the statute required that the acknowledgment should be that the wife executed the deed without fear or compulsion of her husband or any one else, the omission of the latter words was held fatal to the certificate. *Bronson v. Cahill*, 4 McL. 19. For cases of acknowledgments held not voluntary, see *Edgerton v. Jones*, 10 Minn. 427; *Helm v. Helm*, 11 Kan. 19; *Anderson v. Anderson*, 9 Kan. 112. See also *post*, §121.

³ *Homer v. Schonfield*, 84 Ala. 313; s. c. 4 South. Repr. 105.

⁴ *Chaffe v. Oliver*, 39 Ark. 531; *Leftwich v. Neal*, 7 W. Va. 569; *Bernard v. Elder*, 50 Miss. 336; *Pratt v. Battels*, 28 Vt. 685; *Bagby v. Emberson*, 79 Mo. 139; *Dennis v. Tarpenny*, 20 Barb. 371; *Belcher v. Weaver*, 46 Tex. 293; s. c. 26 Am. Rep. 267; *Blackburn v. Pennington*, 8 B. Mon. 219. *Garrett v. Moss*, 22 Ill. 363; *Kavanaugh v. Day*, 10 R. I. 393; *Louden v. Blythe*, 27 Pa. St. 22; s. c. 67 Am. Dec. 442.

⁵ *Mickel v. Gardner*, 41 Ark. 491.

Where the statutory expression was, "of her own free will, without undue influence or compulsion of her husband," the omission of the words "of her own free will," was held immaterial on the ground that the wife's freedom from the control of all other persons than the husband is presumed, and need not be shown, and the remainder of the expression sufficiently negated the undue influence of the husband.¹ As will be seen by reference to the cases cited in the notes, the courts have usually been liberal in the allowance of equivalent expressions in certifying the voluntary character of the wife's execution.² Duress on the part of the husband cannot be shown as against a subsequent *bona fide* purchaser of the property.³

¹ *Tubbs v. Gatewood*, 26 Ark. 128. 'The South Carolina form of certificate for relinquishment of dower provides that the wife shall declare that she acts "freely, voluntarily and without compulsion, dread or fear of any person or persons whomsoever." The courts, it has been said, have no right to dispense with what the statute requires. *Laird v. Scott*, 5 Heisk. 314; *Boykin v. Rain*, 28 Ala. 332; s. c. 65 Am. Dec. 349; *Henderson v. Rice*, 1 Coldw. 223.

² "Without any fear, threats or compulsion," held equivalent to "freely and voluntarily." *Allen v. Lenoir*, 53 Miss. 321. Where the certificate read "with fear or compulsion of any one," instead of "without," this was held a patent clerical error and not to vitiate. *King v. Merritt* (Mich.), 34 N. W. Repr. 689.

"Voluntarily consenting," held equivalent to "of her own free will and accord, without coercion or compulsion of her husband." *Shaller v. Brand*, 6 Binn. 435; s. c. 6 Am. Dec. 489.

Omission of "undue influence," held immaterial, where "freely and voluntarily and without fear or compulsion," is used. *Goode v. Smith*, 13 Cal. 81. Omission of "husband" from the phrase, "undue influence of her husband," held a mere clerical error. *Gorman v. Stanton*, 5 Mo. App. 585. "Restraint" held equivalent to "constraint." *Edmondson v. Harris*, 2 Tenn., ch. 427.

But statement that there was a "satisfactory private examination," is not sufficient, *Jones v. Lewis*, 8 Ired. L. 70; nor that the wife "desired the acknowledgment to be certified," *Bartlett v. Fleming*, 3 W. Va. 163; and that she acknowledged the instrument to be her act and deed "in due form," does not supply the omission of "voluntarily." *Lucas v. Cobbs*, 1 Dev. & Bat. 228.

"Without any bribe, threat or compulsion from her husband," held equivalent to "willingly." *Belcher v. Weaver*, 46 Tex. 293; s. c. 26 Am. Rep. 267.

³ *Lane v. Schlemmer*, 114 Ind. 296; s. c. 5 Am. St. Rep. 621; 15 N. E. Repr. 454; *Gardner v. Case*, 111 Ind. 494; s. c. 13 N. E. Repr. 36.

• §110. The Wish not to Retract.

The wife may have freely and voluntarily signed the instrument, but the explanation of its effect, or some other circumstance, may induce her, at the last moment, to desire to withdraw her assent, and, therefore, a number of the statutes require that her continued assent shall be expressed by a statement that she does not wish to retract it, or words of similar import; and in such case, the omission of the required expression will be fatal to the certificate.¹ In Ohio the certificate must state that she is "still satisfied" with the deed;² in Kentucky, that she "consents that it may be recorded;"³ and in North Carolina, that she "doth now voluntarily assent thereto."⁴ These provisions are designed to confer upon the wife a *locus penitentiæ*—an opportunity to withdraw before she is irrevocably bound. As this right to retract is absolute and unqualified, the courts will not enforce a performance of her bond for title to convey land;⁵

¹ Davis v. Agnew, 67 Tex. 206; s. c. 2 S. W. Repr. 43, 376; Le Bourgeoise v. McNamara, 5 Mo. App. 576; Landers v. Bolton, 26 Cal. 548; Linn v. Patton, 10 W. Va. 187; Burkett v. Scarborough, 59 Tex. 496; Bateman's Petition, 11 R. I. 585; Grove v. Zumbro, 14 Gratt. 501; Hughes v. Lane, 11 Ill. 123; Laidley v. Cent. Land Co., 30 W. Va. 505; 4 S. E. Repr. 705; Blair v. Sayre, 2 S. E. Repr. 97; 29 W. Va. 604; Churchill v. Moore, 1 R. I. 209; Ruleman v. Pritchett, 56 Tex. 482; Bolling v. Teel, 76 Va. 487.

² Ward v. McIntosh, 12 O. St. 231, overruling Card v. Patterson, 5 O. St. 319.

³ Statement that the wife "is still satisfied therewith," held equivalent to the statutory expression that she "consented that the deed might be recorded." Martin v. Davidson, 3 Bush, 574.

⁴ But the omission of the statutory words held immaterial where a voluntary execution was sufficiently stated. Etheridge v. Ferebee, 9 Ired. L. 312; Robbins v. Harris, 96 N. C. 557; s. c. 2 S. E. Repr. 70. The officer's certificate must contain his conclusion that the conveyance is not unreasonable or injurious to her. Code, §1835; Sims v. Ray, 96 N. C. 87; s. c. 2 S. E. Repr. 443.

⁵ Cross v. Evarts, 28 Tex. 531; Warren v. Jones, 69 Tex. 462; Jones v. Goff, 63 Tex. 255. In Warren v. Jones, *supra*, the court holds that a conveyance made under a power of attorney from a married woman is binding on her, and attempts to draw a distinction between her right to retract under a bond for title, and under a power of attorney. The distinction, however, is one without a substantial difference, a distinction of terms only; and the decision is elsewhere in the opinion properly put on the ground of *stare decisis*.

and partly for this reason also, it is held in some instances that her conveyance made through a power of attorney is not binding.¹

§111. Substantial Compliance.

The rule that a substantial compliance with the statute is sufficient—that immaterial words may be omitted, and words of equivalent import to those of the statute may be used—obtains with reference to the certificate of a married woman's acknowledgment,² and has been, perhaps, sufficiently illustrated by the cases already cited in this chapter. By some of the courts the rule is applied without any apparent distinction between the certificate in these cases and those pertaining to ordinary acknowledgments; but with other courts there has been, in a few instances, a noticeable tendency towards a stricter construction of certificates of the wife's acknowledgment.³ Thus, in *Blair v. Sayre*, 29 W. Va. 604, it is held that a statement in the certificate that the wife acknowledged "that she had willingly executed the same (deed) and does not wish to retract it," is not a substantial compliance with the statute which requires the certificate to show that "she acknowledged the same to be her act and deed, and declared that she had willingly executed the same, and does not wish to retract it." *John-*

¹ See *post*, §117.

² *Martin v. Davidson*, 3 Bush, 574; *Pickens v. Kniseley*, 29 W. Va. 1; *Belcher v. Weaver*, 46 Tex. 293; s. c. 26 Am. Rep. 267; *Shields v. Netherlands*, 5 Lea, 198; *Campbell v. Moon*, 16 S. Car. 107; *Kottman v. Ayer*, 1 Strobh. 552, 572; *Gordon v. Leech*, 81 Ky. 229; *Gates v. Hester*, 81 Ala. 357; s. c. 1 South. Repr. 848.

Where the question was whether an acknowledgment had in fact been properly made, it was said: "The law prescribes no set terms in which acknowledgments must be formulated. They are orally made. The officer must judge of their meaning and effect. Manner and gesture even may aid him in that, and he must judge whether the husband is far enough away to enable him to certify that the examination was privy." *Donahue v. Mills*, 41 Ark. 421.

³ *Wingo v. Parker*, 19 S. Car. 13; *Dewey v. Campau*, 4 Mich. 365; *Rice v. Peacock*, 37 Tex. 392; *Merritt v. Yates*, 71 Ill. 636; s. c. 22 Am. Rep. 128; *Manchester v. Hough*, 5 Mason, 67; *Laidley v. Cent. Land Co.*, 30 W. Va. 505; s. c. 4 S. E. Repr. 705.

son, C. J., delivering the opinion, says that the case of *Belcher v. Weaver*, 46 Tex. 293, is precisely in point to the one at bar, but that the reasoning of the Texas court is entirely unsatisfactory—to him.

§112. Joint Certificates.

It is a common practice for the acknowledgment of both husband and wife to be certified in one certificate; the recitals as to their appearance before the officer, their identity, and the fact of acknowledgment being usually made as to both parties at one and the same time, followed by a separate statement of the privy examination of the wife.¹ In these joint certificates it is often the case that some of the words relating to the wife's acknowledgment are transposed out of the exact order and connection in which they occur in the statutes, but this has usually been held immaterial. Where the certificate stated that the husband and wife severally acknowledged the instrument to be "their act and deed," and the words "act and deed" were not used again in the subsequent portion of the certificate relating to the wife's privy examination, it was held that the certificate substantially showed that the wife in her separate examination acknowledged the deed to be her act.²

§113. Identity of the Wife.

It sometimes happens that in a joint certificate the words of identity, "known to me," etc., are used in connection with the name of the husband only, and are not repeated in connection with the wife's name in the subsequent part relating to her separate acknowledgment. Usually the wife's name is

¹ See for examples, *Belcher v. Weaver*, 46 Tex. 293; s. c. 26 Am. Rep. 267; *Stringer v. Swenson*, 63 Tex. 7; *Muir v. Gallaway*, 61 Cal. 498; *Webster v. Hall*, 2 Har. & McH. 19; s. c. 1 Am. Dec. 370.

² *Saylor v. Romanet*, 52 Tex. 562.

Omission to fill the blanks in the latter part of a printed form of joint certificate, with the name of the wife, may be aided by reference to the previous portion where the parties are jointly mentioned. *Donahue v. Mills*, 41 Ark. 421. But compare *Hartshorn v. Dawson*, 79 Ill. 108; *Merritt v. Yates*, 71 Ill. 636; s. c. 22 Am. Rep. 128.

followed by the description, "wife of the said A." (the husband already mentioned); yet still the question arises as to the omission in such case to state specifically that the wife is known to the officer. This point has been more than once before the Supreme Court of Illinois, and in that state the omission is held fatal.¹ In the case first presenting the question there is a dissenting opinion by Chief Justice Breese, holding that such certificate shows a substantial compliance with the law, and that the objection is too technical to be permitted to defeat the right.² Under the liberal rule of construction that has usually been applied by the courts to the statement of identity, the certificates in these cases might properly have been held sufficient.³ In addition to the considerations ordinarily influencing the construction of the certificate of acknowledgment, it may be observed as a well known fact that an introduction by the husband at the time of acknowledgment usually constitutes the extent of the officer's acquaintanceship with the wife; and that under the customs and usages of our country he is not expected to question as to her family history, or to call for further proof of her marriage or identity.⁴ In Tennessee the statute, aided by the construction of the court, presents the proper form of certificate in such cases. There the

¹ Coburn v. Herrington, 114 Ill. 104; Heinrich v. Simpson, 66 Ill. 57; Lindley v. Smith, 46 Ill. 524.

² Lindley v. Smith, *supra*, cited fully in 1 Devlin on Deeds, §558.

³ See cases cited, *ante* §77, and Hiles v. La Flesh, 59 Wis. 465; s. c. 18 N. W. Repr. 435.

The words of identity in the Alabama statute (Code of Ala., §2822), are "known or made known to me to be the wife of the within named" grantor. A certificate reciting that "A. H., wife of R. B. H., whose name is signed to the foregoing instrument, and who is known to me, acknowledged," etc., was held to sufficiently show that the *wife* was known to the officer, and known to be the wife of the grantor. Gates v. Hester, 81 Ala. 357; s. c. 1 South. Repr. 848.

⁴ The principle upon which the courts proceed is that the law does not mould the habits, the manners and the transactions of mankind, to inflexible rules, but adapts itself to the business and the circumstances of the times, and keeps pace with the improvements of the age. Lyle v. Richards, 19 Serg. & R. 351.

words of identity occur in the statutory form in this connection: And also appeared Mary Smith, wife of the said John Smith, with whom I am personally acquainted, etc., and it is held that the officer is not required to be personally acquainted with the wife, but only with the husband.¹

§114. Community Property.

In several states, especially Texas and California,² all property acquired during the existence of the marital relation, except that acquired by gift, devise or descent, is community property of the husband and wife, and is subject, unless it be the homestead, to disposition by the husband alone.³ As the joinder of the wife in a conveyance of such property by the husband is not necessary, it follows that defects in her acknowledgment in such case are immaterial, since her signature as well as acknowledgment can be dispensed with as surplusage.⁴ Although the conveyance be

¹ Bell v. Lyle, 10 Lea, 44. As the officer certifies in the preceding part of the certificate that he is acquainted with the husband, it is evident that the court looked to the reason and spirit of the matter; as otherwise they might plausibly have held, and without doing serious violence to the rules of grammar, that the statute intended the words of identity in the latter part of the certificate to apply to the wife.

² Rev. Stats. of Tex., §§2852-3; Civ. Code of Cal. §§162-4, 172; Maguire v. De Fremery, 76 Cal. 401; Morse v. Jones, 63 Cal. 12. The law of community property, derived mainly from the civil and Spanish law, prevails with some statutory differences in New Mexico, Arizona, Louisiana and Florida, and also in Nevada, Idaho and Washington Territory. Comp. Laws Ariz., §1968; Charauleau v. Woffenden, 1 Ariz. 243; Rev. Civ. Code La., §§2332-4; McCaffrey v. Benson, 40 La. 10; s. c. 3 South. Repr. 393; Code of Wash. Ter., §2409; Lemon v. Waterman, 2 Wash. Ter. Rep. 485; s. c. 7 Pac. Repr. 899; Andrews v. Andrews, 3 Wash. Ter. 286; s. c. 14 Pac. Repr. 68; Ray v. Ray, 1 Idaho, 566; Laws of Nev., 1873, §§152, 156; Dominguez v. Lee, 17 La. 296. See also, Tillinghast v. Champlin, 4 R. I. 209, and cases in notes to §182, *post*.

³ Parker v. Coop, 60 Tex. 112; Parry v. Kelly, 52 Cal. 334; Tucker v. Case, 39 Tex. 102; Eslinger v. Eslinger, 47 Cal. 62; Succession of Dejan, 40 La. Ann. 437; s. c. 4 South. Repr. 89; Parker v. Chance, 11 Tex. 518; Smith v. Smith, 12 Cal. 216; s. c. 73 Am. Dec. 533; Huston v. Curl, 8 Tex. 239; s. c. 58 Am. Dec. 110; Peet v. Commerce Ry. Co., 70 Tex. 522; s. c. 8 S. W. Repr. 203; *post*, §182.

⁴ Tom v. Sayers, 64 Tex. 339; Pixley v. Huggins, 15 Cal. 127; Stephens v. Matthews, 69 Tex. 340; s. c. 6 S. W. Repr. 567.

As against the title conveyed by an older unrecorded deed from the husband, the wife cannot be a *bona fide* purchaser from the husband

made to the wife alone, and the property be in fact her separate property, yet if made during the marriage, the law, *prima facie*, presumes the property to be community, and a purchaser from the husband alone will be protected unless the recitals in the deed to the wife show it to be her separate property, or there be other facts putting the purchaser upon actual notice of her title.¹ The presumption of community property may be countervailed by a recital in the deed that the premises are conveyed as and for the separate property of the wife, or are paid for out of her separate means, as such recital will charge subsequent purchasers dealing with the husband with notice of the wife's title.²

where the consideration of the deed to her is community property; nor can the husband in such case be the agent of the wife in making a contract with himself resulting in such second deed. *Pearce v. Jackson*, 61 Tex. 642.

¹ *French v. Strumberg*, 52 Tex. 109; *Cooke v. Bremond*, 27 Tex. 459; *McComb v. Spangler*, 71 Cal. 419; s. c. 12 Pac. Repr. 347. Where the deed is to the husband alone, the legal title is in him, although the equitable title be in the community estate, and a purchaser from the husband, after the wife's death, without notice of her equitable title, will be protected. *Edwards v. Brown*, 68 Tex. 329; s. c. 5 S. W. Repr. 87. The statute and decisions seem to be different in Louisiana as to the legal title. Civ. Code, art. 2371; *Provost v. De la Houssaye*, 5 La. Ann. 610. 611; *Dominguez v. Lee*, 17 La. 296.

Where a wife abandoned by her husband, conveyed property, in his name, it was held under the facts and pleadings of the case that the registration of the deed from her was notice to a subsequent purchaser from the husband. *Zimpleman v. Robb*, 53 Tex. 274.

² *Morrison v. Clark*, 55 Tex. 437; *Cline v. Upton*, 56 Tex. 319; *Kirk v. Navigation Co.*, 49 Tex. 215; *Montgomery v. Noyes* (Tex.), 11 S. W. Repr. 138; *post*, §182.

Actual notice of the wife's separate title will defeat the judgment lien of a creditor of the husband, if given before a sale of the property under the judgment. *Bonner v. Stephens*, 60 Tex. 618; *Parker v. Coop*, 60 Tex. 114; *McKamey v. Thorp*, 61 Tex. 649; *Stoker v. Bailey*, 62 Tex. 299; *Ross v. Kornrumpf*, 64 Tex. 390; though in *Wallace v. Campbell*, 54 Tex. 87, it seems to have been held that notice after the judgment lien attached came too late.

The remark in *Garner v. Thompson*, 1 Tex. Law Rev., 286 (May, 1883), that a purchaser must take notice of the existence of the vendor's family and their rights to the land under our marital laws, held *obiter dicta* in *Edwards v. Brown*, 68 Tex. 329. See as to California, *post*, §182.

§115. Relinquishment of Dower.

Some of the statutes require that in order to bar a married woman's right of dower, an express relinquishment of dower shall be stated in the certificate of her acknowledgment; and where this is the case, the statute must be complied with, or the deed will not have that effect. The acknowledgment need not be in the very words of the statute;¹ but a certificate omitting this matter and showing only that the wife acknowledged the execution of the instrument, is not sufficient.² Where, in a conveyance of the wife's separate property, the certificate contained also the words appropriate to bar her dower, the super-added words were held not to restrict or impair the acknowledgment already made, but to show a mistaken intent to release her right of dower, in addition to the interest already conveyed, and were treated as surplusage.³

A married woman's interest in land, inherited from the community estate of her mother, cannot be transferred by a release of all interest in the community estate, executed by her to her father, for value, but without privy acknowledgment or the joinder of her husband. *Stephens v. Shaw*, 68 Tex. 261; s. c. 4 S. W. Repr. 458.

¹ *Dundas v. Hitchcock*, 12 How. 256.

² *Lindley v. Smith*, 46 Ill. 524; *Thomas v. Meier*, 18 Mo. 573; *Becker v. Quigg*, 54 Ill. 390.

³ *Stone v. Montgomery*, 35 Miss. 83; *Grapengether v. Fejevary*, 9 Iowa. 163; s. c. 74 Am. Dec. 336. In Florida this principle of construction has been carried further. Thus, where the certificate stated that the wife made herself party to the deed (of her separate property), "for the purpose of relinquishing her right of dower," she having no such right, present or prospective, this was construed to be an acknowledgment of the due execution of the deed according to its language and import. *Evans v. Summerlin*, 19 Fla. 858. See *contra*, *Allendorf v. Gaugengihl*, 146 Mass. 542; s. c. 16 N. E. Repr. 283; and as supporting the Florida case, *Johnson v. Parker* (Ark.), 11 S. W. Repr. 681.

Where the statute provided that the wife, in order to relinquish dower, should acknowledge *and subscribe* the deed before the officer, a certificate showing a proper acknowledgment, but failing to show that the relinquishment was subscribed before the officer, was held bad. *Kay v. Jones*, 7 J. J. Marsh. 38. See further as to relinquishments, *Mosely v. Hankinson*, 23 S. Car. 519; *Lane v. Dolick*, 6 McLean. 200; *Sykes v. Sykes*, 49 Miss. 190; *Ford v. Gregory*, 10 B. Mon. 177; *Tomlin v. McChow*, 5 J. J. Marsh. 135; *Leavitt v. Lamprey*, 13 Pick. 383; *Powell v. Monson*, 3 Mason, 349; *Lufkin v. Curtis*, 13 Mass. 223; *Stevens v. Owens*, 25 Me. 94; *Hall v. Savage*, 4 Mason, 273; *Dutton v. Stewart*,

§116. Acknowledging Deed with Blanks.

In the case of *Drury v. Foster*,¹ the Supreme Court of the United States had occasion to pass on the validity of a mortgage of the wife's lands, signed by her and duly acknowledged, but in which there were blanks for the name of the mortgagee, and the amount of the mortgage debt, at the time of such execution by her. It was conceded that aside from the question raised by the blanks, the instrument was valid, and also that ordinarily parol authority is sufficient to authorize such blanks to be filled by an agent. But upon the ground that a married woman was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage, and that there could be no acknowledgment of the instrument within the requisitions of the statute until the blanks were filled and the deed complete, it was held that the mortgage was a nullity, and no better than so much blank paper; and further, that to hold the wife estopped by her acts, which included the receipt by the husband, as her agent, of the money advanced, would be to introduce into the law an entirely new system of conveyances of the real property of *femes covert*. The statutes of Minnesota, it was said, in requiring a separate and privy examination, disable the wife from executing or acknowledging a deed by procuration, and from making a power of attorney.

117. Wife's Power of Attorney.

At common law the wife could not make a valid power of attorney to convey real property,² and this is still the settled law in a number of the states.³ But by force of stat-

41 Ark. 101; *Johnson v. Parker* (Ark.), 11 S. W. Repr. 681; *Williams v. Cudd*, 26 S. Car. 213; s. c. 2 S. E. Repr. 14; *post*, §120.

¹ 2 Wall. 24; s. c. 1 Dillon, 460.

² *Mays v. Frazee*, 4 Litt. 391; *Bank of L. v. Gray*, 84 Ky. 565; s. c. 2 S. W. Repr. 168; *Field v. Moore*, 19 Beav. 176.

³ *Allen v. Hooper*, 50 Me. 373; *Holladay v. Daily*, 19 Wall. 609; *Sumner v. Conant*, 10 Vt. 9; *Boyd v. Turpin*, 94 N. C. 137; *Earle v. Earle*, 1 Spen. 347; *Caldwell's Appeal* (Pa.), 7 Atl. Repr. 211; *Elliott v.*

utes in some states, and of decision alone in a few others, the right of a wife to convey by power of attorney is now recognized.¹ In Texas, although the statute requires a privy examination and expression of the wife's desire not to retract, in the acknowledgment of her conveyances, the courts have held, without any enabling act, that she may convey by power of attorney.² On the ground that she has the right to retract until the conveyance is complete, they adhere, however, to the general doctrine that specific performance of her bond for title or other executory contract will not be enforced.³ So, also, the Texas court has re-

Teal, 5 Saw. 249; *Kearney v. Macomb*, 16 N. J. Eq. 189; *Lewis v. Coxe*, 5 Harris, 401; *Toulman v. Heidleberg*, 32 Miss. 268; *Clarke v. Reins*, 12 Gratt. 103; *Pilcher v. Smith*, 2 Head. 209; *Carr v. Williams*, 10 Ohio, 310; *Butt v. Broughton*, 72 Ala. 294; *Bank of Louisville v. Gray*, 84 Ky. 565; s. c. 2 S. W. Repr. 168.

¹ Civ. Code of Cal., §6094; *Dow v. Gould*, 31 Cal. 646; *Rev. Stats. of Wis.*, §2222; *Weisbrod v. Chicago, etc.*, 18 Wis. 41; *Hardenburg v. Larkin*, 47 N. Y. 113; *Roarty v. Mitchell*, 7 Gray, 243; *Stats. of Fla.*, 1881, ch. 150, §11; *Rev. Stats. of Ohio*, 1880, §4108; *Gen. Stats. of Ky.*, 1881, ch. 24, §36; *Rev. Stats. of Mo.*, 1879, §670; *Howell's Stats. of Mich.*, 1882, §5725; *Code of N. C.*, 1883, §1257; *Rev. Stats. of Ind.*, 1881, §2949; *Gridly v. Wynant*, 23 How. 503; *Wilkinson v. Getty*, 13 Iowa, 137; *Warren v. Jones*, 69 Tex. 462; s. c. 6 S. W. Repr. 775.

² *Patton v. King*, 26 Tex. 685; s. c. 84 Am. Dec. 596; *Cannon v. Boutwell*, 53 Tex. 626; *Warren v. Jones*, *supra*.

³ *Jones v. Goff*, 63 Tex. 255; *Burch v. Jones (Ky.)*, 5 S. W. Repr. 408; *Wright v. Duffield*, 2 Baxt. 218; *Rockafellow v. Oliver*, 41 Ark. 169; *Warren v. Jones*, 69 Tex. 462; *Cross v. Evarts*, 28 Tex. 531; *Lane v. McKeen*, 15 Me. 304; *Waterman on Specif. Perf.*, §127; *Hord v. Taubman*, 79 Mo. 101; *Baldwin v. Snowden*, 11 O. St. 203; *Ackert v. Pultz*, 7 Barb. 386.

Equity will not enforce a wife's contract to convey not acknowledged by her, although the purchaser has paid the consideration, and is in possession. *Goss v. Furman*, 21 Fla. 406, citing *Bish. on Law of Mar. Wom.*, §601; *Story Eq.*, 1391; 2 Kent, 168; *Rooney v. Michael*, 84 Ala. 585; s. c. 4 South. Repr. 421; *Blythe v. Dargin*, 68 Ala. 370. But see *Homeopathic Co. v. Marshall*, 32 N. J. Eq. 106.

Where on an agreement to exchange lands the wife received the deed of the other party, and then refused to acknowledge a deed conveying her tract, the court would not compel her to acknowledge the deed, but divested her of the title to the tract received. *Burns v. McGregor*, 90 N. C. 222, citing *Atkinson v. Richardson*, 74 N. C. 455; *Towles v. Fisher*, 77 N. C. 437. Had it been a case of money paid by the purchaser, instead of land given, he would have been remediless. *Scott v. Battle*, 85 N. C. 184.

fused to recognize the wife's power of attorney as valid when it is made to the husband.¹

§118. Wife Acting as Feme Sole.—Abandonment.

The general rule of the common law is that where the husband absolutely deserts his wife, or leaves the state without any intention of returning, or is *civiliter mortuis*, his wife is regarded as a *feme sole*, and may hold and convey property as such.² It follows that her conveyance, in such case, may be made without privy examination; the theory of the law being that, as to her contracts, she has no husband, or is already separate and apart from him, so as to be freed from that presumed coercion against which the law ordinarily seeks to protect her. In a case where the husband was absent for five years, not contributing to the wife's support, so far as the evidence disclosed, although she visited him once or twice during the time, a deed by her alone, without privy examination, was upheld.³ While the

A married woman signed and duly acknowledged a deed of her property, in which the grantee's name was left blank, and the consideration was recited at \$1,500, that being the price at which she was willing to sell. Her husband, without consulting her as to taking a less price, accepted \$1,000 from a purchaser, filled in the purchaser's name, and delivered the deed. No question is made by the court as to the sufficiency of the parol authority to the husband to fill the blank with the grantee's name, but as he exceeded his authority in taking a less price, and as the purchaser was chargeable with notice of that authority by the recital in the deed of \$1,500 as its consideration, it is held that no title passed. *Cole v. Bamme*, 62 Tex. 108.

¹ *Conner v. Boutwell*, 53 Tex. 627; *Peak v. Brinson*, 71 Tex. 310.

² *Wright v. Hays*, 10 Tex. 130; *Hector v. Knox*, 63 Tex. 613; *Wheaton's Selwyn*, title Baron and Feme; *Gregory v. Paul*, 15 Mass. 31; 17 Serg. & R. 130; *Ann Berta Lodge v. Leverton*, 42 Tex. 18; *Clements v. Ewing*, 71 Tex. 370; 2 *Vernor*, 104, 614. So held where a presumption of the husband's death existed. *Rosenthal v. Mayhugh*, 33 O. St. 155, and see *Patterson v. Lawrence*, 90 Ill. 174.

³ *Wright v. Hays*, *supra*. And so held in a case where the husband being arrested for a crime broke jail and escaped. *Cheek v. Bellows*, 17 Tex. 613. Again affirmed in *Fullerton v. Doyle*, 18 Tex. 4, where it is said that evidence as to the period of abandonment is not material except to show that the abandonment is not temporary in its character; also in *Kelley v. Whitmore*, 41 Tex. 648. The wife, when abandoned, may convey her separate property without the existence of any necessity for the

current of decision justly supports this view of the law, there is at least one case of high authority to the contrary.¹

Where a married woman holds herself out as unmarried for a long period of time, living apart from her husband, she will be held estopped by her conduct from calling to her aid the statutes relating to the acknowledgment of deeds, for the purpose of defeating her conveyance.²

§119. Re-acknowledgment and Ratification.

Where a deed is void as to the wife for want of proper acknowledgment, a re-acknowledgment by her after her discoverture will operate to give it full force and effect, and will relate back to the date of the original delivery, where the rights of third parties have not intervened.³

sale; but, *aliter*, it seems, as to community property. *Clements v. Ewing*, 71 Tex. 370.

¹ *Rhea v. Rhenner*, 1 Pet. 105; s. c. 7 Curtis, 478, where it is held that although the husband had been absent for five years, contributing nothing to the wife's support, and although she might contract debts as a *feme sole*, yet she could not convey real property without the joinder of the husband and the privy examination.

² *Reis v. Lawrence*, 63 Cal. 129; s. c. Am. Rep. 83; *Ogle v. Ogle*, 41 O. St. 359; *Hand v. Hand*, 68 Cal. 135; s. c. 8 Pac. Repr. 705. But where the matter of estoppel is not involved, it is held that under Civ. Code Cal., §§1186, 1191, making a certificate of privy examination and explanation essential to the validity of the wife's deed, there is no exception for the case of a married woman living separate from her husband, and a conveyance by such a woman, of land constituting her separate estate, without such certificate, is void, and this result is not affected by §192, providing that a wife may convey her separate property without her husband's consent. *Danglade v. Elias* (Cal. 1889), 22 Pac. Repr. 69.

A woman who is living apart from her husband under a decree of separation is a *feme sole* entitled to convey her property as such. *Piper v. May*, 51 Ind. 283; *Delafield v. Bradley*, 108 N. Y. 524; s. c. 15 N. E. Repr. 428; 11 Cent. Repr. 315; *Coleman v. Coleman*, 37 La. Ann. 566. The rule is not applied where the husband is insane. *Heidenheimer v. Thomas*, 63 Tex. 287; and see, further, *Richeson v. Simmons*, 47 Mo. 20; *Cullers v. Henry*, 66 Tex. 497. In New Hampshire, six months' residence apart from the husband authorizes her to convey alone. Gen. Laws, 1878, ch. 183, §4.

³ *Riggs v. Boylan*, 4 Biss. 445; *Cahall v. Citizen's Association*, 61 Ala. 233. But a deed not acknowledged by the wife until after suit filed for the land by the grantee, cannot be introduced in evidence. *Carn v. Haisley*, 22 Fla. 317, citing *Hollingsworth v. Flint*, 101 U. S. 591; *Jones v. Loftin*, 16 Fla. 189.

After a conveyance by her of the property to a third person, a re-acknowledgment comes too late, as no title passed by the original instrument.¹ So, the wife, after becoming sole, may ratify and make effectual the deed by re-delivering it,² or by such conduct and acquiescence on her part as will be held equivalent to an express ratification.³ The courts, however, are not agreed as to the character and extent of the acts and proof necessary to constitute a sufficient ratification, as will appear by reference to the cases cited in the notes below.⁴

¹ *Durfee v. Garvey*, 63 Cal. 406; *Enterprise Co. v. Sheedy*, 103 Pa. St. 492.

² *Smith v. Shackelford*, 9 Dana, 476; *Jordan v. Jordan*, 9 Serg. & R. 268; s. c. 11 Am. Dec. 724; *Newell v. Anderson*, 7 O. St. 12.

³ Long acquiescence after discovery held sufficient. *Conklin v. Bush*, 8 Pa. St. 517. So, payment by her, as widow, of the interest due on a mortgage. *O'Keefe v. Handy*, 31 La. Ann. 832. Or receipt of payment by her, as widow, for the land conveyed. *Hodges v. Powell*, 96 N. Car. 64; s. c. 2 S. E. Repr. 182. The re-delivery may be proved by circumstances. *Carter v. Strapham*, Cowp. 201. See also, *Spafford v. Warren*, 47 Iowa, 47.

⁴ Evidence such as in the case above, held incompetent to establish a ratification. *Price v. Hart*, 29 Mo. 171. Proof that the widow knew of the defective acknowledgment, and said that she had confirmed the deed, held insufficient proof of a re-delivery, it not appearing that she knew an actual re-delivery was necessary. *Smith v. Shackelford*, 9 Dana, 476.

Under the Ohio and Virginia statutes, a deed by husband and wife, conveying the wife's land, is inoperative to pass her title, unless the husband, she having duly acknowledged the deed, has, in her life-time, and by an acknowledgment in the form prescribed by law, signified his consent to such conveyance. His acknowledgment made after her death is of no effect. *Sewall v. Haymaker*, 8 Sup. Ct. Repr. 1348; s. c. 127 U. S. 719. So, in Alabama, where a married woman signed and acknowledged a deed of her land, but it was not signed and delivered by her husband until after a bill filed to subject the land to her debts, it was held that there was no alienation of the land until after suit begun. *Code of Ala.*, §2348; *Rooney v. Michael*, 84 Ala. 585; s. c. 4 South. Repr. 421; *Carn v. Haisley*, 22 Fla. 317; *Hollingsworth v. Flint*, 101 U. S. 591.

⁵ *Smith v. Head*, 75 Ga. 755.

Where the husband forged his wife's signature to a mortgage, and procured a notary to give a false certificate of acknowledgment, and she afterwards was induced by the notary to sign and acknowledge, before another notary, an instrument attempting to ratify the mortgage, it was held ineffectual, as criminal acts are incapable of ratification. *Howell v. McCrie*, 36 Kan. 636; s. c. 14 Pac. Repr. 257, citing *Workman v. Wright*, 33 O. St. 405; s. c. 31 Am. Rep. 546.

120. Validating Deeds of Married Women.

Legislative acts validating conveyances of married women defective by reason of imperfect acknowledgment or certificate thereof, have been constantly assailed as unconstitutional, because impairing vested rights, and in some instances the objection has prevailed;¹ the position being that as title does not pass by the defective deed in such case, it is made to pass by virtue of the statute alone. Happily this view has not largely prevailed,² and yet it must be confessed that it is in harmony with the general tenor of the decided law relating to the separate acknowledgments of married women.

In many instances this curative legislation has been designed to remedy formal errors only, and to heal defects in the certificate only where the acknowledgment was in fact properly made.³ The courts in affirming the constitution-

¹ Alabama Ins. Co. v. Boykin, 38 Ala. 510; s. c. 65 Am. Dec. 349; Elliott v. Peirsoll, 1 McLean, 11.

² For cases sustaining the validity of these acts see *ante*, §97; Barnett v. Barnett, 15 Serg. & R. 72; s. c. 16 Am. Dec. 518; Lycoming v. Union Bank, 15 Pa. St. 171; Webb v. Den, 17 How. 577; Dulaney v. Tilgham, 6 Gill & J. 461; Watson v. Bailey, 1 Binn. 476; Johnson v. Richardson, 44 Ark. 365; Watson v. Mercer, 8 Pet. 88.

Deeds of married women take effect against intervening purchasers only when properly acknowledged and registered, and cannot relate back by amendment or validation so as to effect them. Coal Creek Co. v. Heck, 83 Tenn. (15 Lea), 497, 513, citing Harrison v. Wade, 3 Cold. 565; Fall v. Roper, 3 Head. 486.

A wife joined with her husband in a conveyance of his separate real estate, but neither the deed nor the certificate of acknowledgment contained any words relinquishing dower. An act validating acknowledgments defective because of "any words omitted" therefrom was held to apply; it being presumed, as she had no other than a dower interest in the land, that she joined in the deed for the purpose of conveying it, and that the officer had omitted the appropriate words of relinquishment from his certificate of her acknowledgment in ordinary form. Johnson v. Parker (Ark.), 11 S. W. Repr. 681.

³ Chestnut v. Shane, 16 Ohio, 599; Cooley's Const. Lim., 463, 467; Hollingsworth v. McDonald, 2 Har. & J. 230; s. c. 3 Am. Dec. 540; McDannell v. Horrell, 1 Tex. Un. Cas. 521; Raverty v. Fridge, 3 McLean, 230; Johnson v. Taylor, 60 Tex. 360. This last case involved the constitutionality of an act providing for the correction of defective certificates by a suit in court for that purpose. In an able opinion by Justice Stayton, it is said that the statute applies in cases of married women's acknowledgments as in those of

ality of these statutes have declared that the mere making of the certificate is a formal act which the legislature might have dispensed with in the first instance, and in the place of which it may afterwards substitute other evidence, without depriving any one not entitled to protection on equitable grounds, of any right in law or morals.¹ The courts, however, have gone further than this, and have held that although the acknowledgment may not in fact have been made in compliance with law, or may not have been made at all, and on account of this the deed may not have passed the wife's title, yet that it is within the power of the legislature, by a subsequent statute, to validate the instrument and give effect to the intention of the parties.² Such an act, said the Supreme Court of the United States, does not impair the obligation of any contract either in its terms or its principles. It supposes the titles of *femes covert* to be good, however acquired, and provides that deeds of conveyance made by them shall not be void because there is a defective acknowledgment of the deeds by which they have sought to transfer the title. So far then as it has any legal operation, it goes to confirm and not to impair the contract of the *femes covert*. It gives the very effect to

other persons, citing *Webb v. Den*, 17 How. 578; that the certificate of the officer is but a formal act to give evidence of the acknowledgment actually made; that the rules of law pertaining to remedies and evidence do not ordinarily enter into nor form a part of any contract, nor can they be regarded as being of the essence of any right a party may seek to enforce, citing *Cooley's Const. Lim.*, 457; *Smithwick v. Smithwick*, 49 N. Y. 517; *Howard v. Most*, 64 N. Y. 268; *Hepburn v. Curts*, 7 Watts, 301; that the statute does not attempt to create a right where none before existed, but simply permits parties to show by the judgment of a court that which, before the statute was enacted, could be shown only by the certificate of the officer; and that a deed willingly executed by a married woman, and properly acknowledged by her, is not void because the officer has failed to make a proper certificate of the facts.

¹ *Johnson v. Taylor*, *supra*; *Cooley's Const. Lim.*, 463, 467, and cases there cited.

² *Barnett v. Barnett*, 15 Serg. & R. 72; s. c. 16 Am. Dec. 518; *Lane v. Nelson*, 79 Pa. St. 407; *Tate v. Stoolzfoos*, 16 Serg. & R. 35; s. c. 16 Am. Dec. 546; *Goshorn v. Purcell*, 11 O. St. 641.

their acts and contracts which they intended to give, and which, from mistake or accident, has not been effected.¹ Such an act, it has also been said, does not divest any vested right, but on the contrary gives proper effect to contracts made by the wife fairly and in good faith, by which she intended but failed to pass the title to another, merely because the proper legal forms were not observed. The legislative will which prescribed these forms may say that a non-compliance therewith shall be waived or excused.² A very recent case before the Supreme Court of Arkansas illustrates that under the later decisions a liberal rule of construction will be applied to these validating acts even as against married women. The court say that when a wife joins her husband in a conveyance of his lands, she having only a dower interest therein, it will be assumed that she joined for the purpose of conveying that interest; and while, it seems, this presumption may not be sufficient to warrant the court in holding that such interest did pass, where neither the deed nor the certificate of her acknowledgment contained any words of relinquishment of dower, yet where the legislature afterwards passed a validating statute, healing acknowledgments defective because of "any words omitted" therefrom, the act was held to apply, and to make the acknowledgment effectual to convey the dower interest. In such case it will be presumed in law that the officer omitted from his certificate of her privy acknowledgment, complete in itself as a separate acknowledgment,

¹ *Watson v. Mercer*, 8 Pet. 88.

² *Dentzel v. Waldie*, 30 Cal. 138. This was a case under a curative act validating deeds executed under powers of attorney made by married women, incapacitated as at common law from making such a power. For other cases, see *Maxey v. Wise*, 25 Ind. 1; *Foster v. The Bank*, 16 Mass. 245; *Gibson v. Hibbard*, 13 Mich. 217; *Town of Danville v. Pace*, 25 Gratt. 11; *Underwood v. Lilly*, 10 Serg. & R. 99; *Blount v. The City of Janesville*, 31 Wis. 648; *Payne v. Treadwell*, 16 Cal. 238; *Johnson v. Richardson*, 44 Ark. 365; *Journay v. Gibson*, 56 Pa. St. 60; *Kearney v. Taylor*, 15 How. 517.

the additional words proper to relinquish the dower interest.¹

§121. Wife Impeaching the Certificate.

The extent to which a married woman will be permitted to impeach and deny the truth of a certificate showing a proper acknowledgment by her, has been already considered,² and there is little more that need be added here. Where the statute either expressly or by construction makes the certificate *prima facie* evidence only, parol evidence is admitted, without connecting the grantee with fraud, to destroy the certificate by showing that there was no privy examination, or that the deed was not explained to the wife, or other want of compliance with the law.³ In the absence of such legislation, the general rule prevails that the certificate can be impeached only for fraud of which the grantee has knowledge or notice,⁴ and that, as against a *bona fide*

¹ Johnson v. Parker, 11 S. W. Repr. 681, citing on the first point, Dutton v. Stewart, 41 Ark. 101.

² *Ante*, §§87-90. In North Carolina the taking of a married woman's acknowledgment was formerly regarded as a judicial act, not open to collateral attack. Wright v. Player, 72 N. C. 94; Woodbourne v. Gorrell, 66 N. C. 82; but it is now no longer regarded as judicial, and her acknowledgment may be impeached for duress. Thus, where a creditor sued out an arrest of the husband for debt, charging fraudulent representations, and the wife was induced thereby, at the importunity of the husband, to mortgage her land to secure bail, a verdict in her favor was sustained. Ware v. Nesbit, 94 N. C. 664, citing Jones v. Cohen, 82 N. C. 75. The burden of proof is on the wife, and the evidence must be clear and convincing. Ford v. Osborne, 45 O. St. 1; Rust v. Goff, 94 Mo. 511; s. c. 7 S. W. Repr. 418; 13 West. Repr. 608; Hitz v. Jenks, 123 U. S. 298; s. c. 8 Sup. Ct. Repr. 143.

³ Drury v. Foster, 1 Dillon, 460; Dodge v. Hollingsworth, 6 Minn. 25; s. c. 80 Am. Dec. 433; Rust v. Goff, 94 Mo. 511; s. c. 7 S. W. Repr. 418; Fogarty v. Finley, 10 Cal. 239. s. c. 70 Am. Dec. 714; Van Bracklen v. Fonda, 12 Johns. 468; s. c. 7 Am. Dec. 339. And the certificate permitted to be impeached by the officer who made it. Pickens v. Knisely, 29 W. Va. 1; s. c. 6 Am. St. Rep. 622; Mays v. Price, 95 Mo. 603; s. c. 8 S. W. Repr. 731. But in O'Ferral v. Simplot, 4 Iowa, 381, it is said that where the statute says the certificate shall not be conclusive, this refers only to fraud, and without fraud the certificate is not amendable.

⁴ Shelton v. Aultman, 82 Ala. 316; White v. Graves, 107 Mass. 325; s. c. 9 Am. Rep. 38; Miller v. Yturria, 69 Tex. 549; Hartley v. Frosh, 6 (13—Reg. of Title.)

purchaser of the property the certificate is conclusive, unless it be a forgery, or be given without any acknowledgment whatever having been made or attempted by the wife.¹

Tex. 208; s. c. 55 Am. Dec. 772; *Singer v. Rook*, 84 Pa. St. 442; s. c. 24 Am. Rep. 204; *Kerr v. Russell*, 69 Ill. 666; s. c. 18 Am. Rep. 634; *Harkins v. Forsythe*, 11 Leigh, 294; *Webb v. Burney*, 70 Tex. 322; *Johnston v. Wallace*, 53 Miss. 331; s. c. 24 Am. Rep. 699; *Baldwin v. Snowden*, 11 O. St. 203; s. c. 78 Am. Dec. 303. But see *Central Bk. v. Copeland*, 18 Md. 305; s. c. 81 Am. Dec. 597.

The testimony of the woman alone not sufficient evidence. *Johnson v. Van Velsor*, 43 Mich. 208; s. c. 5 N. W. Repr. 273, citing *Moore v. Fuller*, 6 Or. 272. The Matter of *Wool*, 36 Mich. 299. The proof must be very clear. *Herrick v. Musgrove*, 67 Iowa, 63; *Pickens v. Knisely*, 29 W. Va. 1; s. c. 6 Am. St. Rep. 622.

An angry command by the husband to "dry up that crying and go write your name," not accompanied by threats of personal violence, or any attempt to exercise it, is not sufficient proof of duress. *Gabbey v. Forgeous*, 38 Kan. 62; s. c. 15 Pac. Repr. 866, citing *Carpenter v. Carpenter*, 30 Kan. 712. See as to duress of husband, *Loudon v. Blythe*, 27 Pa. St. 22; s. c. 67 Am. Dec. 442; *Tapley v. Tapley*, 88 Am. Dec. 76; *Green v. Scranage*, 19 Iowa, 461; s. c. 87 Am. Dec. 447; *Gardner v. Case*, 111 Ind. 494; s. c. 13 N. E. Repr. 36.

Where the wife, when asked if she executed the deed freely and voluntarily, said nothing, but laughed, and the certificate was in the usual form, it was held that this was but an irregularity, no imposition, fraud, duress or coercion being shown; and as the grantee had no notice of the irregularity, he was protected. *Miller v. Wentworth*, 82 Pa. St. 280.

Where the husband stated to the officer in the wife's presence that she could not write, and asked the officer to sign for her, which was done, and she then acknowledged the deed, this was held sufficient. *Crum v. Brown*, 63 Miss. 495; *Jones v. Gurtie*, 61 Miss. 423; *Mather v. Jarel*, 33 Fed. Repr. 336.

The certificate may be impeached where the consideration is so grossly inadequate and unreasonable as to excite suspicion of unfairness and undue influence, and put the purchaser on inquiry. *Webb v. Burney*, 70 Tex. 322; s. c. 7 S. W. Repr. 841. Or where the grantee knew of the husband's fraud. *Warner v. Hall*, 53 Mich. 371; *Pacific Co. v. Anglin*, 82 Ala. 492; s. c. 1 South. Repr. 852.

¹ In *Smith v. Ward*, 2 Root, 378; s. c. 1 Am. Dec. 80, it was held, with dissenting opinion by Judge Root, that parol evidence was admissible to show an *alibi* of the wife; and see also, *Michener v. Caven-der*, 38 Pa. St. 334; s. c. 80 Am. Dec. 486; *Allen v. Lenoir*, 53 Miss. 321; *Pickens v. Knisely*, 29 W. Va. 1; s. c. 6 Am. St. Rep. 622.

Where the wife gave verbal authority to a notary to certify her acknowledgment to a deed afterwards to be presented to him by her husband, with her signature to it, she was not permitted to take advantage

Ch. 4.] ACKNOWLEDGMENT BY MARRIED WOMEN. [§121.

of this irregularity, nor of fraud in regard to the contents of the deed practiced on her by her husband, as against parties who had advanced money in good faith on the deed. *McHenry v. Day*, 13 Iowa, 445.

A decree setting aside a wife's deed *in toto* because of defective acknowledgment, and vesting her with all the rights of the grantee, held erroneous; the proper decree being simply to set aside the deed as to her. *Mays v. Price*, 95 Mo. 603; s. c. 8 S. W. Repr. 731. The deed holds for the husband's life interest. *Barton v. Morris*, 15 Ohio, 408, 422.

Acknowledgment by Telephone.—Where the certificate was in due form, proof that the separate acknowledgment of the wife was taken by telephone over a distance of three miles, no fraud, duress or mistake being alleged, held not to invalidate. *Banning v. Banning*, 22 Pac. Repr. 210.

In *Hayden v. Moffatt* (Tex.), 12 S. W. Repr. 820, reported since this chapter was put in type, the officer, in his certificate of a married woman's acknowledgment, recited that "this deed from N. B., and J. B., her husband, to S. T. was produced to me in my office this day and was acknowledged by the grantors to be their act and deed; and said instrument of writing being shown and explained to Mrs. N. B., separate and apart from her husband, she acknowledged same freely and willingly, without fear or undue influence of her said husband, and desired the same certified and recorded. *Held*, defective:

1. In failing to certify the identity of Mrs. B. See *ante*, §§76, 77, 113.

2. In not showing that she was examined by the officer, and the deed explained to her by him privily and apart from her husband. See *ante*, §§104, 106.

3. In failing to show that she "declared she had willingly signed the deed for the purposes and considerations therein expressed." Rev. Stats. of Tex., §4313. She might, says the court, "acknowledge the same willingly," without having signed it willingly. It would seem from this that a lack of willingness at the moment of signing cannot be remedied by a subsequent willingness. It is not decided whether, in such case, the wife could erase or cross out her name and willingly sign it again at the time of the acknowledgment. Compare *Belcher v. Weaver*, 46 Tex. 293; 26 Am. Rep. 267, and cases cited in §§108, 109, 111.

4. The conveyance (by a wife) depends on the proper acknowledgment of the execution of the deed, while the registration depends upon a proper certificate of the facts of acknowledgment. See §98 *et seq.*

In *Jones v. Robbins*, (Tex.), 12 S. W. Repr. 824, the rule that the wife may convey her property, or even the homestead, through an agent authorized by power of attorney, is affirmed. See §117. Proof of the wife's signature and voluntary execution is unavailing. See §§99, 123.

Where the subscribing witness who makes the proof for record is present at the execution of an instrument, it is not necessary that he should swear he signed at the request of the grantor, though otherwise if he was not so present; citing Rev. Stats., §4314, and following *Dorn v. Bert*, 15 Tex. 65; *post*, §125; and a statement that the grantor signed in the presence of the witness held equivalent to stating that the witness saw the signing.

CHAPTER 5.

PROOF BY WITNESSES.

- §122. Proof without aid of statute.
- 123. General features of the statutes.
- 124. Statutory provisions.
- 125. Witnesses of grantor's selection.
- 126. Proof by one when statute requires two.
- 127. Witness defined—When disqualified.
- 128. The certificate and affidavit—Certainty required.
- 129. Other statutory matters.
- 130. Proof of handwriting.

§122. Proof Without Aid of Statute.

The practice of proving a deed for the purpose of having it recorded, grew up in New York in colonial times as a part of the common law of that state.¹ And in North Carolina it has been held that where no statutory provision existed for proof for registry by evidence of handwriting, recourse could be had to the common law mode of proof for the purpose of registry.² Registration is usually considered as purely statutory, and these are perhaps the only instances in which the common law has been permitted to supply deficiencies in the statute. A resort to the common law in such case has been denied in other states, and with the better reason. "Apart from the express enactment of our statute," said Chief Justice Waldo, of Oregon, "we do not know what is intended by the expression 'proving a deed' for purposes of registration."³ The generally received doctrine is that the whole system of registry is arti-

¹ Van Cortlandt v. Tozer, 17 Wend. 338; s. c. 20 Wend. 423.

² Carrier v. Hampton, 11 Ired. 307. The statute has since supplied the deficiency. Love v. Harbin, 87 N. C. 249; Black v. Justice, 86 N. C. 504; Davis v. Higgins, 91 N. C. 382.

³ McIntyre v. Kamm, 12 Or. 253; s. c. 7 Pac. Repr. 27.

ficial, and rests entirely on the terms of the statute; and that the proof of a deed for record is a distinctly different matter from its proof in evidence before a court.¹

123. General Features of the Statutes.

In a few states there are no statutory provisions for making proof for record of a deed or other instrument,² the only mode of authentication being by acknowledgment of the maker; while in one state the statute makes no provision for authentication in any other mode than on proof by subscribing witnesses.³ In a number of states such proof is authorized to a limited extent only, and is confined to cases where the grantor is dead or absent,⁴ or where the proof is to be made within the home state;⁵ and in several states such proof can be made only before a court.⁶ In a majority of the states, however, a deed may, without any restrictions, be authenticated for registry by proof of a witness, or witnesses, as well as by acknowledgment. This proof of the instrument for record is a matter purely statutory, and is entirely distinct, and usually different, from the proof required to admit it in evidence in a court.⁷ Where the privy examination of a married woman is required to her conveyance, it cannot be proved for record by a witness.⁸

¹ Woolfolk v. Graniteville Co., 22 S. Car. 332; Cairrell v. Higgs, 1 Tex. Un. Cas. 56; *ante*, §§1-4, 22, and cases there cited.

² New Mexico, Wyoming and Connecticut.

³ Gen. Stats. of S. Car. (1882), §§768, 1777. This does not apply to releases by married women.

⁴ Comp. Laws of Kan. (1879), ch. 22, §12. See also, in last chapter of this work, laws of Iowa, Miss., Maine, Vermont, Mass., Minn., Mich. and Wisconsin.

⁵ This seems to be the case in Delaware, Maine, Mich., Minn., Rhode Island, Vermont and Wisconsin.

⁶ Kansas, New Hampshire, Mass., Maine, Wisconsin, Mich. and Minn.

⁷ Cairrell v. Higgs, 1 Tex. Un. Cas. 56.

⁸ Berry v. Donley, 26 Tex. 739; Martindale on Conv., §266; *ante*, §99; Steele v. Lewis, 1 Mon. 49; Groesbeck v. Bodman (Tex.), 11 S. W. Repr. 322.

§124. Statutory Provisions.

The statutes relating to proof for record by witnesses are even more variant and diversified than those pertaining to acknowledgments. The following are some of the features and provisions to be found among the codes and statutes of the different states—that the proof for registry may be made by one witness;¹ that it must be made by two;² that the witnesses must sign at the request of the grantor;³ and in the presence of the grantor and of each other;⁴ that the witnesses must know the grantor;⁵ and know him to be 21 years old;⁶ that the witness must be known, or made known to the officer;⁷ the proof must be that the witness saw the grantor sign;⁸ that the grantor acknowledged to the witness that he had signed;⁹ that the witness saw him sign *or* heard him acknowledge;¹⁰ that he saw the grantor sign *and* heard him acknowledge;¹¹ that he saw the grantor sign and deliver the deed;¹² that he witnessed the instrument on the day the same bears date.¹³

¹ Rev. Stats. of Tex. (1879), §4314; Rev. Stats. of Mo. (1879), §682; Code of Ga. (1882), §2707; Rev. Stats. of Wis. (1878), §2228. This is the rule in the greater number of states.

² Code of Va. (1873), ch. 117, §3; Mil. & Ver. Code of Tenn. (1884), §§2850, 2862; West Va. and Ky.

³ Rev. Stats. of Tex. (1879), §4316; Comp. Laws of Utah (1876), §641.

⁴ Code of Ala. (1876), §2159; Code of Miss. (1880), §1218; *Allen v. Holden*, 32 Ga. 423.

⁵ Rev. Stats. of Tex. (1879), §4315; Comp. Laws of Utah (1876), §641; Mil. & Ver. Code of Tenn. (1884), §2873; *Crockett v. Campbell*, 2 Humph. 411.

⁶ Indiana; see last chapter of this work.

⁷ Rev. Stats. of Mo. (1879), §682; *Brogan v. Savage*, 5 Sneed, 689; Comp. Laws of Ariz. (1877), §2257; Rev. Stats. of Tex. §4315.

⁸ Code of Ga. (1873), §2707; Gen. Stats. of S. Car. (1882), §1777.

⁹ Mil. & Ver. Code of Tenn., §2873.

¹⁰ Code of Miss. (1880), §1218; Rev. Stats. of Tex., §4316.

¹¹ Gen. Stats. of Ky. (1873), ch. 24, §15; Comp. Laws of Utah (1876), §641.

¹² *Rushin v. Shields*, 11 Ga. 636; s. c. 56 Am. Dec. 436; Gen. Stats. of S. Car. (1882), §1777; *Eaton v. Freeman*, 63 Ga. 538.

¹³ Code of Ala. §2159; Tennessee. The statutory provisions will more fully appear by reference to the forms of proof in Chapter 11, given under the head of each state.

§125. Witnesses of Grantor's Selection.

Quite a number of the statutes require the proof to show that the witness signed as such at the request of the grantor. Where the statute does not require this, it is not necessary to state it in the certificate;¹ and even where the statute contained the provision, but prescribed no form of certificate, the courts of one state have held, in the earlier cases, that the failure of the certificate to show the request was immaterial. In holding a certificate omitting this matter to be a substantial compliance with the law requiring the officer to make a certificate of the proof, the learned judge delivering the opinion of the court concludes that "to require more would seriously jeopardize the security of titles, and there can be no good reason assigned why more should be required."² It may be remarked that on this kind of reasoning the courts would be fully authorized to dispense with nearly, if not all, the statutory law relating to authentication. In another and earlier case the same court excused the omission on another and somewhat more ingenious theory. The statute provided that the witness should state that he saw the grantor subscribe the deed, or that the grantor acknowledged in his presence that he had subscribed and executed the same, and that he had signed the same at the request of the grantor. The certificate stated only that the witness saw the grantor execute the deed; and the court held that the last provision of the statute, as to the request, had relation only to the next preceding clause, relating to cases where the grantor acknowledged to the witness that he had executed the deed, and was not intended to apply to cases where the witness saw the grantor subscribe.³ The alternative clauses were separated only by a comma—but the decision is fully justified by the sugges-

¹ *Carpenter v. Dexter*, 8 Wall. 513. But otherwise if the statute requires it. *Tate v. Lawrence*, 11 Heisk. 503.

² *Deen v. Willis*, 21 Tex. 642.

³ *Dorn v. Best*, 15 Tex. 62.

tion of Sir Matthew Hale, that courts "should be astute to find means to make acts effectual according to the honest intent of the parties."¹

It is evident, however, that these decisions are not in harmony with the general construction of the registry laws; and the same court, in a later case, while again following them as to another certificate made under the same act of 1846, takes occasion to say that a stricter construction will be given to the present law.² The registry system, in these instances, contemplates that the proof must be effected through instrumentalities of the grantor's own selection; and this would seem to be more a matter of substance than a majority of the statutory provisions relating to authentication. A volunteer who may happen to witness the making and delivery of the deed, but whom the grantor has not called upon to attest it, is not authorized to make the proof in relation thereto. It has been held that the signing and delivery of a deed in the presence of an officer who certifies thereon to these facts, but whose certificate is defective for failing to state that the grantor *acknowledged* the deed, does not constitute such officer an attesting witness under the statute.³

§126. Proof by one Witness where Statute requires two.

In a few instances the statutes require the proof for authentication to be made by two witnesses, and in such

¹ Roe v. Tranmar, Willes, 682.

² Downs v. Porter, 51 Tex. 59.

³ McDaniel v. Needham, 61 Tex. 269. The contrary seems to have been held under the Alabama statute. Rogers v. Adams, 66 Ala. 600. So, where a third party signed as a witness without request, but in the presence of both grantor and grantee, and the deed was delivered to and accepted by the grantee, this was held sufficient. Clements v. Pearce, 63 Ala. 284; Code of Ala. (1876), §2145. And so, under the early Texas statutes, the officer before whom a deed was executed as a public act, might prove it as a witness. McKissock v. Colquhoun, 18 Tex. 149.

A deed was attested by one witness, and acknowledged before an officer, who also, with the witness, signed a memorandum relative to an interlined word, and this was held a sufficient attestation by *two* witnesses. Culbertson v. Whitbeck Co., 8 Sup. Ct. Repr. 1136; s. c. 127 U. S. 326.

case proof by one alone is not sufficient.¹ Where the statute of conveyances requires two witnesses, and the statutes of registry provide that the deed may be proved for record by one of the subscribing witnesses, a question has arisen as to whether a deed with only one witness can be proved for record by the witness. When the statute requires a deed to be attested by witnesses to entitle it to registration, or to render it a valid instrument, the want of such witnesses, or either of them, will vitiate the record of the deed.² But where a deed without witnesses is good between the parties, and as to third parties with notice, actual or constructive, and the number of witnesses is not directly made a prerequisite to registry, if the statute provide that proof for record by one witness shall be sufficient, it might reasonably seem that the absence of the name of a second witness, though two be required to attest, would be immaterial. One witness is sufficient at common law to establish the deed in evidence before a court. The purpose of the statute in requiring the subscription of two witnesses, where it allows the proof for record to be made by one, is doubtless to guard against loss of the means of proof by death or absence of one witness. Where, in such cases, the proof by one witness is offered, the name of the second witness on the instrument is, *pro hac vice*, entirely superfluous; and it may be fairly contended that the designation, in the statute, of the witness authorized to make the proof, as "one of the subscribing witnesses," should be regarded as an incidental description of no controlling significance. Proof for record by a sole subscribing witness has, on these considerations, been held sufficient; although it will be ad-

¹ Pyle v. Maulding, 7 J. J. Marsh. 204; Batte v. Stone, 4 Yerg. 168.

² Pringle v. Dunn, 37 Wis. 449; s. c. 19 Am. Rep. 772; Carter v. Champion, 8 Conn. 549; s. c. 21 Am. Dec. 695; White v. Denman, 16 Ohio, 59; Thompson v. Morgan, 6 Minn. 292; Frostburg Association v. Brace, 51 Md. 508; Hodgson v. Butts, 1 Cranch, 408; Gardner v. Moore, 51 Ga. 268; N. Y. Life Ins. Co. v. Staats, 21 Barb. 570; Van Thorniley v. Peters, 26 O. St. 471; *post*, §145.

mitted that the decision is not in accord with the tenor of strict construction usually given to matters of this kind.¹

§127. Witnesses Defined—When Disqualified.

In Tennessee the words "subscribing witnesses" have been defined to mean that the persons who witness a deed must either have seen the maker sign, or heard him acknowledge his signature; and they must themselves have signed as witnesses in the presence of the maker, by his request or assent, or if they signed as witnesses in his absence, they must have been specially requested by him to attest the instrument as witnesses.² That an attesting witness is interested does not usually invalidate the record,³ especially if it be a subsequently acquired interest.⁴ Under some of the statutes, however, the witness required to a deed must be without a direct, certain legal interest in the land.⁵ The

¹ *Coryelle v. Holmes*, 3 Tex. Law Jour. 481. Judge Quinan rendering the opinion says: "And we are at a loss to conceive why other proof should be required to register than to admit in evidence, or what additional efficacy it would impart to the notice which it was the purpose of the registry to effect, that the deed bore upon its face the attestation of a dozen dumb subscribing witnesses." The ruling as to this deed is affirmed in *Holmes v. Coryelle*, 58 Tex. 685, and again followed in another case arising under the same statute, in *Wilson v. Simpson*, 68 Tex. 312. But as the decision in the first case was measurably rested on the phraseology of the statute under construction, and also on the effect of a subsequent validating statute, these cases cannot be regarded as settling the principle contended for. Proof by one witness is sufficient under the Miss. statute. *Shirley v. Fearne*, 33 Miss. 653; s. c. 69 Am. Dec. 375. So, though the statute requires two witnesses, proof by one is held sufficient where the statute is silent on this point. *McGowan v. Reid*, 27 S. Car. 262. Where one of the two witnesses, though present at the execution of the deed, did not sign until long afterwards, this was held sufficient in equity. *Young v. Young*, 27 S. Car. 201.

² *Tate v. Lawrence*, 11 Heisk. 503, citing 2 Heisk. 405.

³ *Jones v. Ruffin*, 3 Dev. 404; *Johnson v. Turner*, 7 Ohio, 216; and see also *McKinnon v. McLean*, 2 Dev. & Bat. 79, 85; *Welsh v. Lewis*, 71 Ga. 387.

⁴ *Carter v. Corley*, 23 Ala. 612. A corporation mortgage may be proved for record by the president or secretary, if signed by them. For this purpose they may be regarded as subscribing witnesses. *Coe v. N. J. Ry.*, 31 N. J. Eq. 105.

⁵ *Morrill v. Morrill*, 60 Vt. 74; *Coleman v. State*, 79 Ala. 49; *Day v. Adams*, 45 Vt. 510; *Child v. Baker*, 24 Neb. 188; s. c. 38 N. W. Repr. 769.

test of competency is the ability of the witness at the time and place of attestation to testify as to the deed.¹ In most of the states the husband and wife are not competent as subscribing witnesses to each other's deed.² An attesting witness is not thereby disqualified as an officer from taking the grantor's acknowledgment to the instrument.³ It has been held in North Carolina that where a deed is proved for record by an incompetent witness, the record nevertheless imparts notice.⁴

§128. The Certificate and Affidavit—Certainty Required.

It is not necessary that the witness should subscribe his name at the bottom of the officer's certificate of proof, as in case of a formal affidavit; nor that the officer should append a jurat. If this be done, however, it will not vitiate the certificate.⁵ A certificate that the instrument was "duly proven," is not sufficient;⁶ and so it will not suffice for the

¹ *Cairrell v. Higgs*, 1 Tex. Un. Cas. 56; *Tillotson v. Pritchard*, 60 Vt. 94; *Hordin v. Sparks*, 70 Tex. 429; s. c. 7 S. W. Repr. 769; *Carter v. Campion*, 8 Conn. 549.

² *Tillotson v. Pritchard*, 60 Vt. 94. In this case the deed was executed in Minnesota where the wife was competent as an attesting witness, and such attestation was held sufficient when questioned in the courts of Vermont, where she was not competent.

³ *Conley v. Campbell*, 78 Ga. 369; *Baird v. Evans*, 58 Ga. 350. For other Georgia cases as to attestation by witness and officer, see *Williamson v. Moore*, 68 Ga. 585; *James v. Penny*, 76 Ga. 797; *Hearn v. Smith*, 59 Ga. 704.

⁴ "The registration, no matter on what proof made, gives the notice designed for creditors and purchasers." *Ruffin, C. J.*, in *McKinnon v. McLean*, 2 Dev. & Bat. 79, 85. It may be remarked that this kind of reasoning dispenses with probate and acknowledgment altogether. Where one of the two witnesses was the grantor's wife, the record was held of no effect, in *Carter v. Campion*, 8 Conn. 549; and see also, *Winsted Sav. Bank v. Spencer*, 26 Conn. 194.

⁵ *Dana v. The U. S. Bank*, 5 Watts & Serg. 223; *Whitney v. Arnold*, 10 Cal. 531. The certificate in this last case is given in full in 1 Devlin on Deeds, §513, note.

⁶ *Fleming v. Réed*, 37 Tex. 152; *Ross v. McLung*, 6 Pet. 283. Except in North Carolina, where the certificate is not required to be recorded where the proof is made before a home state officer or court. *Starke v. Etheridge*, 71 N. C. 240; *Love v. Harbin*, 87 N. C. 253.

certificate to show only that the witnesses acknowledged or proved their own subscription;¹ nor will a bare statement that they saw the grantor's name subscribed for the purposes therein mentioned.² A failure of the witness to state that he was a witness when the instrument shows him to be such, is immaterial.³ Where the certificate of an ancient deed did not state that the witness was sworn, that matter was presumed.⁴ Where a witness who had signed by making his cross-mark, swore "to the best of his knowledge and

The officer merely noted "jurat" opposite the name of the witness "as a memorial of the fact" that proof for record had been made by the witness. The court, while conceding that it would be the better practice to formally make out a certificate of the probate, held that to allow the objection would shake the titles of a large portion of the land owners of the state owing to the untechnical form in which these probates are usually made. Bynum, J., in *Starke v. Etheridge*, *supra*.

The certificate of probate was not required to be made out and recorded in South Carolina prior to the act of 1872. *Hillegas v. Hartley*, 1 Hill Ch. 106; *Monks v. Jenkins*, 2 Hill Ch. 9; *Lamar v. Raysor*, 7 Rich. 509; *Wood v. Reeves*, 23 S. Car. 382.

¹ *McCorkle v. Amarini*, 12 Ala. 17. The certificate must show that the witness was sworn. *Jackson v. Livingston*, 6 Johns. 149; *Jackson v. Osborn*, 2 Wend. 555; *Bradstreet v. Clarke*, 12 Wend. 673; *Norman v. Wells*, 17 Wend. 137; *Van Cortlandt v. Tozer*, 17 Wend. 338; s. c. 20 Wend. 423; *McIntyre v. Kamm*, 12 Or. 253; s. c. 7 Pac. Repr. 27. In this last case it is said that the ruling in *Hunt v. Johnson*, 19 N. Y. 292, to the effect that it would be presumed that the witness was sworn, is not sound in principle, nor in accord with the practice in New York prior to the statute.

For cases giving certificates of proof held sufficient, see *Myrick v. McMillan*, 13 Wis. 188, 191; *Wilson v. McEwan*, 7 Or. 87, 104; *Talbert v. Dull*, 70 Tex. 675; s. c. 8 S. W. Repr. 530.

The witnesses to a deed of confirmation need not swear that the grantor was the one who signed the deed intended to be confirmed. *Crockett v. Campbell*, 2 Humph. 411.

Under former statutes of Virginia a chattel mortgage, admitted to record on the oaths of only two subscribing witnesses was void even as against creditors with notice. *Hodgson v. Butts*, 3 Cranch, 140.

In Florida proof by a subscribing witness to a mortgage, that he saw the mortgagor sign the instrument, and acknowledge that he did so, is not sufficient to authorize its admission to record. *Edwards v. Thom* (Fla.), 5 South. Repr. 707.

² *Fipp v. McGehee*, 5 Port. 413.

³ *Carpenter v. Dexter*, 8 Wall. 513.

⁴ *Hunt v. Thompson*, 19 N. Y. 279. This case is justly criticized in *McIntyre v. Kamm*, 12 Oregon, 253. The certificate must show the witness was sworn. See cases cited in note 1, *ante*.

belief" that he signed the instrument as a witness, and that the grantor acknowledged that he signed it, this was held sufficient.¹ Proof that the witness saw a firm name signed without stating which member signed it, is not sufficient.² Where the witness testified that he would not have attested the deed unless the grantor had acknowledged it, this was held sufficient proof of acknowledgment.³ A statement that the witness saw the grantor sign *or* heard him acknowledge, was held bad for uncertainty.⁴ Where the statement was that the grantor signed and delivered the instrument, and that the witness signed at his request, but there was no statement that he saw the grantor sign, it was held to sufficiently import that fact.⁵ A bare statement that the signature of the grantor is in his handwriting is not usually sufficient, the witness' means of information should be stated.⁶

§129. Other Statutory Requisites.

Where the statute requires the proof to show that the witness knew the grantor, a statement in the certificate that the witness saw the grantor sign the deed is not sufficient proof of identity.⁷ Unless the statute specifically requires

¹ *Stramler v. Coe*, 15 Tex. 211. See *post*, §130.

² *Baldwin v. Richardson*, 33 Tex. 16.

³ 2 Wash. (Va.), 58.

⁴ *Harvey v. Cummings*, 68 Tex. 599; s. c. 5 S. W. Repr. 513. The learned judges who so ably decided the earlier cases by this court, cited *ante*, §119, were no longer on the bench, otherwise a construction would certainly have been found whereby to make effectual the certificate in this last case. Compare this case with the one cited in the next note below where, in addition to the uncertainty as to which method afforded the witness his means of knowledge, there was no direct affirmation as to either method, and yet the certificate was sustained.

⁵ *Stinnett v. House*, 1 Tex. Un. Cas. 484.

Discrepancy in the name of the witness as signed to the deed, and as stated in the certificate, held immaterial, see *Waters v. Spofford*, 58 Tex. 115; *Page v. Arnim*, 29 Tex. 53.

⁶ The proof should show upon what grounds the witness founds his opinion. *Carrier v. Hampton*, 11 Ired. 307; *Jackson v. Waldron*, 13 Wend. 178.

⁷ *Jackson v. Gould*, 7 Wend. 366; *Jackson v. Osborn*, 2 Wend. 555; s. c. 20 Am. Dec. 649; *Harrison v. Wade*, 3 Cold. 505; *Averill v. Wilson*, 4 Barb. 183.

the officer to certify that the witness making the proof is personally known to him, this is not necessary;¹ and where it is required, the precise language of the statute need not be used.² What shall be sufficient proof that the person offering himself is a subscribing witness, is left to the discretion of the officer.³ The grantor's acknowledgment to a witness that he had executed the deed is equivalent to an original execution in the presence of the witness.⁴ In Alabama it is held unnecessary that the proof show that the witness saw the instrument signed and delivered *on the day the same bears date*, although this latter is required by the statute.⁵ But the certificate must comply with the statute of that state in showing that the witnesses signed in the presence of the grantor and of each other.⁶ Under an early Texas statute, proof by witnesses who were not subscribing witnesses, was held sufficient, although this was conceded to be a departure from the literal import of the terms of the statute.⁷ Where the statute required the proof to show the delivery of the deed as well as its signing and sealing by the grantor, an omission to state the delivery has been held fatal.⁸

¹ Johnson v. Prewitt, 32 Mo. 553; Parker v. Phillips, 9 Cow. 94. Where the certificate did not show that the officer knew the witness, the court intended that he had satisfactory evidence of the person being the subscribing witness. Wood v. Harrow, 11 Johns. 434 (A. D. 1808).

² Sheldon v. Stryker, 42 Barb. 284; s. c. 27 How. 387.

³ Kellogg v. Vickory, 1 Wend. 406.

⁴ Parker v. Phillips, 9 Cow. 94. It is not necessary that the grantor sign the deed in the presence of both the witnesses. Little v. White (S. Car.), 7 S. E. Repr. 72.

⁵ Harbinson v. Harrell, 19 Ala. 753; Parsons v. Boyd, 20 Ala. 112. And see, as to a similar provision in the Tennessee statute, Lea v. Polk County, 21 How. 493. Such expressions are doubtless written in the statutes only for the sake of euphony.

⁶ Dolin v. Gardner, 15 Ala. 758. See further as to proof by witnesses, Simpson v. Simpson, 93 N. C. 373; Davis v. Higgins, 91 N. C. 382; Secrest v. Jones, 21 Tex. 121; Howard v. Colquhoun, 28 Tex. 134; Waters v. Spofford, 58 Tex. 115.

⁷ Paschal v. Perez, 7 Tex. 348; McKissick v. Colquhoun, 18 Tex. 149.

⁸ Rushin v. Shields, 11 Ga. 636; s. c. 56 Am. Dec. 436; Eaton v. Freeman, 63 Ga. 538. So the proof must show the signing by the other witnesses, if that be required. Allen v. Holden, 32 Ga. 423.

§130. Proof by Handwriting.

Where the subscribing witnesses to a deed are dead, it may, in a majority of the states, be proved for record by evidence of the handwriting of the grantor and of at least one subscribing witness.¹ The statutory provision usually applies also to cases where the witnesses are insane, or otherwise incompetent,² or absent from the country,³ or their whereabouts unknown. In some states the signatures of all the attesting witnesses must be proved;⁴ in others, the signature of the grantor, or of the witnesses may be proved;⁵ and in one state, only the signature of the witnesses is to be established.⁶ In quite a number of the states proof of handwriting can be resorted to when the grantor, as well as the subscribing witnesses, is dead, or he refuses to acknowledge the deed, or is out of the country.⁷ More is usually required in making proof by handwriting than where the instrument is proved by a subscribing witness.⁸ Resort

¹ *Stebbins v. Duncan*, 108 U. S. 32; *Rev. Stats. of Tex.*, §4317; *Rev. Stats. of Wis.*, §2227; *Comp. Laws of Ariz.*, §2254; *Gen. Stats. of S. Car.* §§768, 1777.

² *Cairrell v. Higgs*, 1 Ten. Un. Cases, 56.

³ *Hanrick v. Patrick*, 119 U. S. 156.

⁴ *Rev. Stats. of N. J.* (1877), *Conveyances*, 6; *Gen. Stats. of S. Car.* §1777; *New Hampshire*.

⁵ *Code of N. Car.* §1244 (8); *Davis v. Higgins*, 91 N. C. 382; *Comp. Laws of Utah* (1876), §638; *Code of Miss.* (1880), §1221.

⁶ *Code of Ga.*, §2708. Under the early Pennsylvania statutes, *held* that resort could not be had to proof of the handwriting of one witness without accounting for the other. *Davison v. Bloomer*, 1 Dall. 123. Evidence of the signature of the witness must be first offered, and if that cannot be had, then of the signature of the grantor. *Brightly's Purdon's Dig. of Penn.* (1872), *Deeds, etc.*, 15.

⁷ The grantee is a competent witness to make the preliminary affidavit that the grantor and subscribing witnesses are dead, or their residence out of the state or unknown. *Waters v. Spofford*, 58 Tex. 115; and see, also, *Jones v. Hough*, 77 Ala. 437. Not now necessary in North Carolina that the grantor be dead. *Love v. Harbin*, 87 N. C. 253; *Black v. Justice*, 86 N. C. 504.

⁸ A certificate to the effect that the witness swore that he was well acquainted with the handwriting of the subscribing witnesses, and that one of them is dead and the other had been a non-resident of the state for many years, is fatally defective in not stating that the signatures to the deed are in the handwriting of the parties. *Anderson v. Logan*, 99

is seldom had to proof by handwriting, so that it is not deemed necessary here to do more than refer to the statutes in the last chapter, and to the few cases on the subject cited in the notes below.¹ Proof of handwriting may be made, it seems, even where the party signed by making a cross-mark.²

N. Car. 474; s. c. 6 S. E. Repr. 704. For case of proof of handwriting held sufficient, see *Secrest v. Jones*, 21 Tex. 121.

In North Carolina a deed without subscribing witnesses may be probated for record on proof of the handwriting of the grantor; *Howell v. Ray*, 92 N. C. 510; whether such grantor be living or dead. *Love v. Harbin*, 87 N. C. 249, citing *Black v. Justice*, 86 N. C. 504. See *Rollins v. Henry*, 78 N. C. 342.

¹ *McGuire v. Hay*, 6 Humph. 419; *Hightower v. Wells*, 6 Yerg. 249; *Borst v. Empie*, 5 N. Y. 33. Certificate as follows: "I, J. W. S. clerk of the County Court aforesaid do hereby certify that T., one of the above subscribing witnesses, who being duly sworn that he himself with P. signed as witnesses when R. (the grantor) signed and acknowledged the foregoing instrument of writing for the purposes therein set forth." The statute then in force (*Paschal's Dig. of Tex.*, art. 4973) required that one of the witnesses of the number required by law shall swear to the signature of the signer * * * which shall be certified by the recorder," etc. Held that the omission of the word "says" or "said," was a patent clerical error, and that the certificate was sufficient. *Talbert v. Dull*, 70 Tex. 675; s. c. 8 S. W. Repr. 530.

² A party's mark may be proved like his handwriting by a witness who is sufficiently acquainted with it to be able to testify that he believes it to be his. *Strong v. Brewer*, 17 Ala. 706; see also, *Lansing v. Russell*, 3 Barb. Ch. 325.

The mark of a witness cannot, *prima facie*, be identified; and held, therefore, that resort could at once be had to proof of the handwriting of the grantor. *Carrier v. Hampton*, 11 Ired. 307.

Where the mortgagor and witnesses all signed by cross-marks, and were not able to identify the paper, it was held admissible to prove it by the mortgagee, or any person who saw it executed. *Jones v. Hough*, 77 Ala. 437. That a witness signed by a cross-mark does not invalidate the attestation. *Tatum v. White*, 95 N. C. 453.

Where the statute required two witnesses, and there were only two to a deed by several grantors, who signed and acknowledged at different times and places, this was held sufficient. *Hronske v. Janke*, 66 Wis. 252; s. c. 28 N. W. Repr. 166.

An acknowledgment before a Louisiana commissioner must also be before two witnesses, or else it is an act under private signature that must be proved before it is admissible in evidence. *Leibe v. Heber-smith*, 39 La. Ann. 1050; s. c. 3 South. Repr. 283.

CHAPTER 6.

OF THE TIME, PLACE AND OTHER INCIDENTS OF RECORD.

- §131. Time of record, generally.
- 132. Statutory time of record.
- 133. Continued.
- 134. Place of record.
- 135. Continued—General land office.
- 136. Books of record.
- 137. Mortgage in book of deeds.
- 138. Continued.
- 139. Continued.
- 140. Filing for record.
- 141. Filing and withdrawal.
- 142. Indexing.
- 143. Special statutory index.
- 144. Delivery of the deed.
- 145. When witnesses necessary to the record.
- 146. Sealing and signing.
- 147. Description of the property.
- 148. Recording officers.
- 149. Schedules, memoranda, etc.
- 150. Manner of record.
- 151. Payment of recording fees.

§131. Time of Record.

It has been deemed advisable to here group together a number of matters such as do not seem to specially belong under any of the other chapters of this work; and which, although incidental in their character, are yet of much importance, as the effect of the record as notice depends in all cases upon a full compliance with the requirements of the statute.

A deed may be recorded at any time after its execution, and lapse of time will not ordinarily affect the grantees right to have it placed on record.¹ But there are

¹ Irving v. Smith, 17 Ohio, 226; Johnson v. McGehee, 1 Ala. 186; Gill v. Pinney, 12 O. St. 38; McNamee v. Huckabee, 20 S. Car. 190; Sellers v. Sellers, 98 N. C. 13; Citizens' Bank v. Terry, 32 La. Ann. 310; Stewart v. Mathews, 19 Fla. 752.

limits even to this rule, and it has been held that where a deed had not been recorded until after so great a length of time (twenty-six years in the case under consideration), as precluded the party to be affected by it from every reasonable opportunity of detecting any fraud, imposition or forgery that may have been practiced in the case, the instrument could not be deemed a regularly recorded deed so as to authorize the reading of a certified copy of it in evidence.¹

The provision found in some of the statutes allowing a specified time for recording conveyances has been, in its general features, already briefly considered.² Where such provision does not exist, a deed or other instrument operates as notice only from the time it is filed for record, and persons having no actual notice of it, have the right to secure a prior conveyance of, or lien upon, the property in any lawful mode up to the moment of such filing.³ An exception to this rule is found in Connecticut, where it has

¹ Longworth v. Close, 1 McLean, 282. A statutory limitation is found in New Jersey. Rev. Stats. of 1877, *Conveyances*, 15. Where conveyances were not recorded until after a great lapse of time, and were attacked as fraudulent and forged, the delay of record was considered a very significant circumstance. Sibley v. Haslam, 75 Ga. 490. In Louisiana a mortgage ceases of effect, even as between the parties to it, if not inscribed within ten years. Tilden v. Morrison, 33 La. Ann. 1067.

² See *ante*, §7. In Oregon the time is five days; in South Carolina, forty; in Indiana, forty-five; in Kentucky, sixty days; in Virginia, twenty days; in Maryland and Pennsylvania (except Philadelphia), six months; and in Georgia, one year. In Penn. and Ky. a longer time than above stated is allowed where the deed is executed out of the state. Where time is allowed for mortgages, it is usually for a shorter period than above stated for deeds. In Delaware certain kinds of instruments have the privilege of the entire day on which they are executed; Laws of 1885, ch. 213, §4; while others are allowed a much longer time.

³ Thus, where a deed was acknowledged before the recorder and given to him for record, and at the same instant the land was attached by a creditor of the grantor, the court held that as the deed could not be recorded without a certificate, and as it must have taken the recorder some time to write out the certificate, the attachment was entitled to priority. Sigourney v. Larned, 10 Pick. 72. In Georgia, where both deeds are filed after the statutory time, the senior in date is preferred, though last filed. Marcus v. Picquet, 61 Ga. 260.

been held that the grantee is entitled to a reasonable time within which to file his deed for record, and that it is a question of fact for the court below as to what is a reasonable time.¹

§132. Statutory Time for Recording.

Where the statute prescribes a period of time for the record of instruments, two considerations are presented; first, as to the effect of recording within the time; and second, as to the effect of registry made after the expiration of the time. On the first point it is the law without exception, and whether or not it be so declared in the statute, that when the instrument is recorded at any time within the statutory period, it relates back to the date of its delivery, and takes precedence over any subsequent conveyance of the property, though already of record.² Without this, the privilege or preference which the statute confers would be of no effect; and the courts have said that if thereby an innocent subsequent purchaser is made to suffer, the fault is in the statute.³ It is also well settled, by statute in some states⁴ and by decision in others, that when a deed is recorded after the time specified, it is notice from the time the record is made, or the instrument filed for rec-

¹ The deed was delivered at 1 o'clock, P. M.; the land was attached at 7 o'clock, P. M. of the same day, and the deed, left for record at 8 o'clock, P. M. of the next day, was held to be in time. *Goodsell v. Sullivan*, 40 Conn. 83. In Louisiana, a purchase money mortgage, to be entitled to priority, must be "seasonably" recorded. One given in October, 1875, was not seasonably inscribed in September, 1876. *Giovanovitch v. Hebrew Congregation*, 36 La. Ann. 272, 274.

² *Betz v. Mulin*, 62 Ala. 365; *Phelps v. Barnhart*, 88 N. C. 333; *Steele v. Mansell*, 6 Rich. 443; *Clark v. Arnold*, 2 Hay, 287; *Breckinridge v. Todd*, 3 Mon. 54; *Claiborne v. Holmes*, 51 Miss. 146; *Stansell v. Roberts*, 13 O. St. 148; *Nichols v. Hampton*, 46 Ga. 253; *Clarke v. White*, 12 Pet. 178; *McConnell v. Brown*, Lit. Sel. Cas. 462; *Martin v. Sale*, Bail. Eq. 6; *Dale v. Arnold*, 2 Bibb. 605; *King v. Fraser*, 23 S. Car. 543.

³ *Shirras v. Caig*, 7 Cranch, 34; *Kemper v. Campbell*, 44 O. St. 210.

⁴ *Gen. Stats. of Ky.* (1873), ch. 24. §22; *Rev. Code of Md.* (1878), ch. 44, §§16, 22. So, also, in Ohio, South Carolina, Georgia and New Jersey.

ord.¹ This point, though controverted at first,² may now be regarded as established. The grantee loses the right to insist that his tardy registration shall have relation back to the date of delivery, but he does not lose the benefit of registry from the day it may be actually made.³ The months mentioned in the statute are calendar months, reckoned exclusive of the day of registration or filing.⁴ In South Carolina, where a record made after the forty days is by statute declared good against *subsequent* creditors, the lien of a mortgage so recorded takes precedence over debts contracted between its date and the date of its registry.⁵

§133. Time of Recording—Continued.

When two conveyances of the same property are made, and neither is recorded within its statutory time, the rule would apply as between the record of these instruments just as if no period of time for recording had been prescribed, unless the terms of the statute are in some way to

¹ *McRaven v. McGuire*, 9 Sm. & Mar. 34; *Mallory v. Stodder*, 6 Ala. 801; *S. Car. Loan Co. v. McPherson*, 26 S. Car. 431; s. c. 2 S. E. Repr. 267; *Adair v. Davis*, 71 Ga. 769; *Hand v. McKinney*, 25 Ga. 648; *Meni v. Rathbone*, 21 Ind. 454; *Delane v. Moore*, 14 How. 253; *Irvin v. Smith*, 17 Ohio, 226; *King v. Fraser*, 23 S. Car. 543.

² After the eight months had elapsed there existed no authority for recording the deed. *Womack v. Hughes*, Lit. Sel. Cas. 292. And not being good as a recorded instrument, its execution must be proved. *Hog v. Perry*, 1 Lit. 172; *Winlock v. Hardy*, 4 Lit. 472. But it is good as against a purchaser with notice. *Bennett v. Titherington*, 6 Bush, 196.

³ *Steele v. Mansell*, 6 Rich. 437, quoted at length in 1 Dev. on Deeds, §625.

⁴ *Pyle v. Maulding*, 7 J. J. Marsh. 204; *Applegate v. Gracy*, 9 Dana, 215, 226; *Allston v. Allston*, 2 Tread. Const. Rep. (S. C.), 604.

⁵ *King v. Fraser*, 23 S. C. 543; Gen. Stats., §1776. Under the Act of 1843 it was otherwise. *Piester v. Piester*, 22 S. C. 139; *McKnight v. Gordon*, 13 Rich. Eq. 222; *Williams v. Beard*, 1 S. C. 309. By statute of Maryland, courts of equity have been empowered to authorize mortgages to be recorded after expiration of the six months, and in such case the mortgage will impart notice from the date of record; but as to prior creditors, if there be no fraud, it will relate back to its own date. *Stanhope v. Dodge*, 52 Md. 483.

the contrary as by giving preference to the one first recorded.¹ Otherwise, the second one of such conveyances, both recorded after their time, if taken without notice and for valuable consideration, must prevail.² There is one decision, where in such case preference was given to the first deed, though last recorded, and the reason is put on the ground that the grantee in the junior deed had no equity because he happened to have bought during the time allowed for the record of the prior deed, the court saying that had he bought after that time, without notice, his equities would have been entirely different.³ Such a ground is, however, entirely untenable, since the subsequent purchaser must in all cases have no knowledge whatever of the prior conveyance; and in later cases by the same court, the preference given to the deed oldest in date where both are recorded after the time, is placed upon a construction of the terms of the statute.⁴ The allowance of so long a time for recording as one year is unreasonable, since thereby the statute practically suspends the protection of the registry laws for that period, and without sufficient necessity for so doing, subjects all purchasers, however clear the record

¹ *Adair & Davis*, 71 Ga. 769, citing 29 Ga. 405; 25 *Id.* 276; 20 *Id.* 210. "The prior recording of the subsequent conveyance gives it precedence over a prior one subsequently recorded, although neither of them be recorded within the five days." *Fleschner v. Sumpter*, 12 Or. 161; s. c. 6 Pac. Repr. 506; or the fifteen days. *Den v. Richman*, 1 Green, 43.

² *Sanborn v. Adair*, 29 N. J. Eq. 338; *Northup v. Bremer*, 8 Ohio, 392; *ante*, §§13-15, and cases there cited; and see also, *McNamee v. Huckabee*, 20 S. Car. 190; *Leger v. Doyle*, 11 Rich. 118; *Lightner v. Mooney*, 10 Watts, 407; *Souder v. Morrow*, 30 Pa. St. 83; *McGuire v. Barker*, 61 Ga. 339.

If the subsequent conveyance is executed before the record of the prior deed, and is then recorded within its six months, it will relate back to its date and take precedence even though the older deed was first recorded, if it was not recorded within its time. *Leger v. Doyle*, *supra*.

³ *Martin v. Williams*, 27 Ga. 406.

⁴ *Roe v. Maund*, 48 Ga. 461, citing Code of Ga., §2663; *Cobb's Dig.*, 175; *Webb v. Wilcher*, 33 Ga. 565; 29 Ga. 440; 25 Ga. 648; and see *Hockenhull v. Inman (Ga.)*, 4 S. E. Repr. 323.

The statute says that if a mortgage is not recorded in time, it is subordinate to any later mortgage duly recorded, that is, recorded

may be when they buy, to the danger of being supplanted by a prior unknown conveyance.

In Ohio the statute provides that mortgages shall take effect from the time they are delivered for record, but that other deeds and instruments of writing for the conveyance or incumbrance of lands may be recorded within six months, with right of priority. A deed absolute on its face, and recorded as such, but which was really a mortgage, because taken as a security, and with a parol condition of defeasance, was held entitled to record at any time within six months, with right of the record relating back to the date of the instrument. Upon its face and by its terms it was a deed, and the fact that equity subsequently adjudged it a mortgage could not alter the law of its record.¹

§134. Place of Record.

The statutes almost without exception require conveyances affecting real estate to be recorded in the county where the property is situate. There are many exceptions to the rule as applied to instruments relating to personal property, especially chattel mortgages, which will be hereafter considered. The record of a deed in a county other than within its time; hence, where both are recorded after their time, the oldest is preferred irrespective of the dates of record. *Marcus v. Picquet*, 61 Ga. 260.

The statutes as to deeds, and as to mortgages, are separate, and the above rule will not be applied as between a deed and a mortgage. A purchaser by deed takes title as against a prior unrecorded mortgage, though his deed was neither first recorded, nor recorded within its twelve months. *McGuire v. Barker*, 61 Ga. 339; Code, §1957.

As against the lien of a judgment a mortgage must be recorded before the rendition of the judgment. *Richards v. Myers*, 63 Ga. 762; *Janes v. Penny*, 76 Ga. 796; but not so in case of a deed. *Davie v. McDonald*, 47 Ga. 195.

¹ *Kempner v. Campbell*, 44 O. St. 210; s. c. 6 N. E. Repr. 566. The time for recording a deed executed by several grantors at different times, held to run from the date of execution by the last grantor. *Kurts v. Hollingshead*, 4 Cranch C. Ct. 180. Though the statutes require that a mortgage be "forthwith" recorded, this does not change the rule that the record is notice from the time it is made. *Wilson v. Leslie*, 20 Ohio, 161.

that wherein the land lies does not impart constructive notice.¹ Where the county lines have not been definitely determined and established, the grantee must decide at his peril as to the county in which to record his deed.² When, after a conveyance is recorded, a new county is mapped out which embraces the land, a re-record of the deed in the new county is not necessary;³ but if the deed is not recorded until after the establishment of such new county, it must be recorded there, although it may have been executed before the new county was made.⁴ Where an original survey of land lies across a county line, it is sometimes by statute sufficient to record the deed in either county. If the conveyance embraces different tracts lying in different counties, it must be recorded in each county where any tract is situate.⁵ In such case, however, the deed is, as to evidence, a recorded instrument when properly recorded in any one of the counties; and a certified copy of it, upon accounting for the non-production of the original, where that is required, is admissible in evidence in a suit in the other counties affecting the title to the tracts in such other counties where the deed has not been recorded.⁶

¹ *Hawley v. Bullock*, 29 Tex. 216; *King v. Portis*, 77 N. C. 25; *Harper v. Tapley*, 35 Miss. 506; *Perrin v. Reed*, 35 Vt. 2; *St. John v. Conger*, 40 Ill. 535; *Harrison v. Strother*, 1 Bay. 332; *Kerns v. Swope*, 2 Watts, 15; *Lewis v. Baird*, 3 McLean, 56.

² *Jones v. Powers*, 65 Tex. 207; *Adams v. Harden*, 60 Tex. 223.

³ *Stebbins v. Duncan*, 108 U. S. 32; *Milton v. Turner*, 38 Tex. 31; *post*, §187.

⁴ *Astor v. Wells*, 4 Wheat. 466; *Garrison v. Hayden*, 1 J. J. Marsh. 222; s. c. 19 Am. Dec. 70.

⁵ *Hundley v. Mount*, 8 Sm. & M. 387; *Stevens v. Brown*, 3 Vt. 420; s. c. 23 Am. Dec. 215; *Horsley v. Garth*, 2 Gratt. 471; s. c. 44 Am. Dec. 393; *Perrin v. Reed*, 35 Vt. 2; *Delancey v. McKeen*, Wash. C. Ct. 525; *Van Meter v. Knight*, 32 Minn. 205; s. c. 20 N. W. Repr. 142.

⁶ *Hancock v. Tram Lumber Co.*, 65 Tex. 225; *Wilt v. Cutler*, 38 Mich. 189; *Delancey v. McKeen*, *supra*; *Jackson v. Rice*, 3 Wend. 180; *Scott v. Leather*, 3 Yeates, 184.

The record of a deed in one state does not make it admissible in evidence in another state as a recorded instrument; *Papot v. S. W. Ry. Co.*, 74 Ga. 296; nor will the record charge parties in another state with constructive notice. *Crosby v. Huston*, 1 Tex. 203. See top of p. 632.

§135. Place of Record—Filing in General Land Office.

The statutes provide, in some instances, for the filing, noting or recording of instruments for some specific purpose other than that contemplated by the general law of registration. In such cases the record so made will serve only the specific purpose, and will not impart constructive notice to subsequent purchasers so as to obviate the necessity of registry under the general law.¹ Thus a statute relating to assignments for the benefit of creditors required that the deed of assignment should be recorded in the office of the county clerk, but where the deed embraced real estate, such record was held not to exempt it from the operation of the registry law requiring its record in the office of the register of deeds.² The want of registry has been held not to be supplied even by the recitals in a judgment of the probate court by virtue of which the conveyance was executed.³ The filing of instruments, however, in public offices under provision of law, in some cases operates as constructive notice to subsequent purchasers by virtue of the instrument so filed constituting a part of the title of the land to which it relates. Where, for instance, a purchaser cannot make out the title except by reference to the files and books of the general land office, he is chargeable with

Where the land lies in an unorganized county, the registry must be made in the county prescribed by the statute for such record. *Alford v. Jones*, 71 Tex. 519; *Land Co. v. Chisholm*, 71 Tex. 523. Usually the statute prescribes, as the place of record, the county to which the unorganized county is attached for judicial purposes. *Smith v. Anderson*, 33 Minn. 25; s. c. 21 N. W. Repr. 841; Rev. Stats. Ill., ch. 30, §28.

¹ The entry of lands sold by the United States upon the land book kept in the county clerk's office, does not charge a subsequent purchaser with constructive notice of the facts appearing thereon, as such entry is required only for the purpose of taxation. *Berser v. Rankin*, 77 Ill. 289. Where, however, the subsequent purchaser has knowledge of such incidental record, or of a defective record, as by having read it, or otherwise, it may charge notice or put on inquiry, as any other fact. See *Stokes v. Reilly*, 121 Ill. 166; s. c. 11 N. E. Repr. 877; 9 West. Repr. 522; *Walter v. Hartwig*, 106 Ind. 123; s. c. 3 West. Repr. 881.

² *Wagner v. Hodge*, 34 Hun. (41 N. Y. Sup. Ct.), 524.

³ *Piester v. Piester*, 22 S. Car. 139; and see *Fowler v. Evans*, 26 Tex. 636.

notice of all instruments duly filed or matters properly entered of record there.¹ It has been held, however, where the statute had provided that a transfer of land made before the issuance of patent might be recorded in the county where the land lay, as well as filed in the general land office in order that patent issue in the name of the assignee, that the filing of such transfer in the land office alone did not charge with constructive notice a subsequent purchaser under execution issued against the original enterer, or purchaser from the state, who was the grantor in the transfer.² As between two purchasers of the same land from the government, the latter is chargeable with notice of any facts appearing by the records of the land office at which he purchases, going to show the title or claim of the first purchaser.³

§136. Books of Record.

The statutes of perhaps all the states prescribe the use of different books for recording different classes of instruments.⁴ The policy of the registry law is that persons who are to be affected with constructive notice should be able

¹ *Dodge v. Littler* (Tex.), 11 S. W. Repr. 331; *Martin v. Nash*, 31 Miss. 324, citing 2 Fonb. Eq., bk. 3, ch. 3, §1. n. See *Kerr v. Watts*, 6 Wheat. 550.

² *Lewis v. Johnson*, 68 Tex. 448; s. c. 4 S. W. Repr. 644. This case falls on debatable ground, and is distinguishable from the first two cases in the note above, especially the latter, only in that the Texas registry statutes certainly authorized the record of such transfer in the county where the land lay; a point not so clear as to the transfer in the other cases. Yet as the county records, in the Tex. case, showed nothing whatever in relation to the title of the land, the subsequent purchaser must, of necessity, have looked to the general land office to ascertain that title was in the judgment debtor, as in the Mississippi case.

³ *Schnee v. Schnee*, 23 Wis. 377; *Moyer v. McCullough*, 1 Ind. 211.

⁴ Besides separate books for absolute conveyances, and for mortgages and trust deeds, some of the statutes require them for personal property, as in Ga., S. C., Cal., Mo. and Wash. Ter.; for releases of mortgages and liens, as in Va. and W. Va.; for marriage contracts, as in Mo., Cal. and Wash. Ter.; for maps and plans, as in Ohio, Mich. and Kan.; for mechanics' liens, as in Neb., Cal., Wash., Utah and N. M.; and in a few states, as Ill., Minn., Cal. and Idaho, every class of instruments must be recorded in separate books.

to obtain actual knowledge by searching the records, and such a search would not likely prove successful if the instrument were recorded in a wrong book.¹ A record will not operate as constructive notice, unless made in the proper book as required by statute.² The decisions on this subject, however, like the statutes themselves, are not uniform. In some cases a liberal construction has been applied³ and established usage has been recognized in the matter. Thus where the statute required mortgages of real and of personal property to be recorded in separate books, it was held that a mortgage embracing both species of property in the same instrument need be recorded only in the book of real estate mortgages, it appearing that this was the usual custom; and a double record was said to be unreasonable.⁴ Under a statute requiring mechanics' liens to be recorded in a book separate from absolute conveyances, such lien is well recorded in the book for mortgages.⁵ In those states where the statute and decisions attach the full effect of notice to the filing alone, it would seem to be immaterial how, or in what book, if any, the clerk records the instrument.⁶ Where the officer designedly copied a deed in an old, unused

¹ 1 Pom. Eq. Jur., §653.

² *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772; *Van Thorniley v. Peters*, 26 O. St. 471; *Colomer v. Morgan*, 13 La. Ann. 202; *Shaw v. Wilshire*, 65 Me. 485; *James v. Morey*, 2 Cow. 246; *Deane v. Hutchinson*, 40 N. J. Eq. 83; *Parsons v. Lent*, 34 N. J. Eq., 67; *Purdy v. Huntington*, 42 N. Y. 343; s. c. 1 Am. St. Rep. 532.

³ Duplicate copies of deeds regularly deposited in the recorder's office, not bound into volumes, but classified and indorsed, held to constitute a book of record within the meaning of the statute. *Mumford v. Wardwell*, 6 Wall. 423.

The record is not defective because a part of it may be printed instead of written with ink. *Maxwell v. Hartman*, 50 Wis. 660.

⁴ *Anthony v. Butler*, 13 Pet. 423; and see also, *Beals v. Hale*, 4 How. 37. The record notice of a deed duly filed cannot be lost by its being transcribed in a wrong book. *Cluder v. Thomas*, 89 Pa. St. 343. The statute requiring separate books held only directory. *Robertson v. Brown*, 5 La. Ann. 154; *Gillespie v. Cammack*, 3 La. Ann. 248.

⁵ *Quinn v. Logan*, 67 Tex. 600.

⁶ *Cluder v. Thomas*, 89 Pa. St. 343; *Swenson v. Bank*, 9 Lea, 723. See *ante*, §§15-18; *Lewis v. Klotz*, 39 La. Ann. 259; 1 South. Repr. 539.

record book and neglected to index it, the record was held not to impart notice.¹ Under an early Iowa statute the record of a quit-claim deed in a book labeled "mortgages," was held sufficient, it not appearing whether the book was used for mortgages only, or for both deeds and mortgages.²

§137. Recording Deed which is in Reality a Mortgage.

Where a deed absolute on its face is in reality a mortgage, the defeasance being in parol, or in a separate instrument not recorded, the question has frequently arisen as to the effect of recording the conveyance in the registry of deeds. On this point there is a decided conflict in the adjudications of the several states; but the weight of reason, and perhaps also of decided cases, is in favor of the view that such record is valid and sufficient to protect the rights of the mortgagee or grantee in the conveyance.³ It is said that a party is not bound to search the record of deeds to be protected against a mortgage.⁴ To this it may be answered that a proper protection of the interests of one dealing with property demands that he should guard against a prior absolute conveyance of it even more than against an incumbrance on it; and so far as want of notice is concerned, such an one is not in a position to complain that the record of the deed has given him notice of too great an adverse interest.⁵ A deed absolute upon its face is in law a deed, whatever it may be in equity; its terms control as to the

¹ *Sawyer v. Adams*, 8 Vt. 172; *N. Y. Co. v. White*, 17 N. Y. 469.

² *Switzer v. Knapps*, 10 Iowa, 72; s. c. 74 Am. Dec. 375. A trust deed held properly recorded in the book of mortgages. *Swenson v. Bank*, 9 Lea, 713.

³ *Mobile Bank v. Tishamingo*, 63 Miss. 250; *Haseltine v. Espey*, 13 Oregon, 301; s. c. 10 Pac. Repr. 423; *Young v. Thompson*, 2 Kan. 83; *Kemper v. Campbell*, 44 O. St. 210; *Ing v. Brown*, 3 Md. Ch. 521; *Harrison v. Phillips*, 12 Mass. 456; *Seymour v. Darrow*, 31 Vt. 122; *DeWolf v. Strader*, 26 Ill. 231; *Smith v. Smith*, 13 O. St. 532; *Gibson v. Seymour*, 4 Vt. 518; *Clemons v. Elder*, 9 Iowa, 273; *Gibson v. Hough*, 60 Ga. 588, 593; *Benton v. Nicholl*, 24 Minn. 221; *Grellet v. Heilshorn*, 4 Nev. 526; *Knowlton v. Walker*, 13 Wis. 264; *Ruggles v. Williams*, 1 Head. 141.

⁴ *Dey v. Dunham*, 2 Johns. Ch., 182; *Luch's Appeal*, 41 Pa. St. 519.

⁵ *Ruggles v. Williams*, 1 Head. 141; *Young v. Thompson*, 2 Kan. 83.

place where the recorder shall assign it for record, and as to the effect of the record;¹ and although equity may convert an absolute instrument into a mortgage, it will not do so to the prejudice of the grantee, and hold the record of the instrument ineffectual upon technical grounds, or for the reason that it may operate to some extent as a fraud upon general creditors of one or both the parties.²

§138. Record of Mortgage as a Deed—Continued.

The decisions holding that the record, as a deed, of the absolute conveyance is not valid, and not constructive notice of a mortgage, rest upon two distinct grounds: one being afforded by the terms of the particular statutes under construction, and the other being that such decision is demanded by a proper interpretation of the registry laws in their general intent and purpose as designed to afford a protection against fraud. The cases in New York, Pennsylvania and Louisiana³ may be said to rest principally on the former ground; while those in Connecticut and North Carolina are placed entirely upon the latter. The New York act under construction was a peculiar statute concerning mortgages, by which it was declared that every conveyance which appeared by any other instrument to have been intended as a security in the nature of a mortgage, though absolute in its terms, should be considered a mortgage *and liable to be registered as other mortgages*.⁴ In the Pennsyl-

¹ Haseltine v. Espey, 13 Or. 301; Nicklin v. Betts, 11 Or. 406; s. c. 50 Am. Rep. 472.

² Humpries v. Barteel, 10 Sm. & Mar. 282; Hurd v. Brown, 37 Mich. 484; Kuhn v. Groves, 9 Iowa, 305.

³ Cordevielle v. Dawson, 26 La. Ann. 534; Fisher v. Tunnard, 25 *Id.* 179; McCan v. Bradley, 38 La. Ann. 482. In the city and parish of New Orleans, the offices of recorder of deeds and recorder of mortgages are, it seems, distinct and separate offices. Succession of Vilabolas, 3 La. Ann. 477; Lee v. Darramon, 3 Rob. 160. And see, as to New York, Wagner v. Hodge, 34 Hun. 524.

⁴ Brown v. Dean, 3 Wend. 213; White v. Moore, 1 Paige, 551; Grimstone v. Carter, 3 Paige, 421; s. c. 24 Am. Dec. 230; Warner v. Winslow, 1 Sand. Ch. 430; Purdy v. Huntington, 42 N. Y. 343; s. c. 1 Am. St. Rep. 532; James v. Morey, 2 Cow. 246; s. c. 14 Am. Dec. 475.

vania case of *Friedley v. Hamilton*¹ there is a strong dissenting opinion by Judge Tod, and while the decision of the majority of the court is followed in subsequent cases, yet the cases in both of these states are all elsewhere declared to turn upon the peculiar phraseology of their statutes.²

§139. Continued.

In Connecticut the decision of the matter is put squarely on the ground that to permit the record of a deed absolute to give notice of a mortgage, or to protect the rights of the grantee as a mortgagee, would be contrary to the spirit and purpose of the registry laws; and it is said that such a course would not only destroy all the benefits of the recording system as respects mortgages, but would enable the parties, by a change in the form of the mortgage, to convert the system itself into an instrument of fraud.³ The object of registry, it is said in the North Carolina cases, is to give notice of the existence and extent of the incumbrances, and the true character of the deed must appear in the record to give it protection.⁴ Such an instrument, it is declared, works a fraud upon a double set of creditors; cred-

In *Dey v. Dunham*, 2 Johns. Ch. 182, it is said: "This is the language of the statute concerning the registry of mortgages; and recording the deed, *as a deed*, was of no avail in this case." Yet it is to be noted that this case was afterwards reversed on this point in *Dunham v. Dey*, 15 Johns. 555.

¹ 17 Serg. & R. 70. For other cases in that state, see *Calder v. Chapman*, 52 Pa. St. 359; *Edwards v. Trumbull*, 50 Pa. St. 509; *Carpman v. Baccastaw*, 84 Pa. St. 363; *Hendrickson's Appeal*, 24 *Id.* 363; *McLanahan v. Reside*, 9 Watts, 508; s. c. 36 Am. Dec. 136; *Luch's Appeal*, 44 Pa. St. 519; *Jaques v. Weeks*, 7 Watts, 261.

² *Young v. Thompson*, 2 Kan. 83. "We decline to adopt the views of the courts of that state (Pennsylvania), not only as opposed to the overwhelming weight of authority, but also because we think the rule as announced in that state clearly wrong." *Cooper, J.*, in *Mobile Bank v. Tishamingo*, 62 Miss. 250.

³ *Ives v. Stone*, 51 Conn. 446; citing *North v. Belden*, 13 Conn. 376; *Hart v. Chalker*, 14 *Id.* 77; *Stearns v. Porter*, 46 *Id.* 313.

⁴ *Gregory v. Perkins*, 4 Dev. 50; and see also, *Holcombe v. Ray*, 1 Ired. L. 340; *Dakes v. Jones*, 6 Jones, 14; *Gully v. May*, 84 N. C. 434, 440.

itors of the grantee, who is thereby falsely held out to be the real and absolute owner; and creditors of the grantor, whose ownership and interest is thereby covered up and hidden.¹

It is appropriate for the legislature to enact such provisions as may be deemed necessary to effectually guard the registry system against being made in any way auxiliary to fraud; and this has been done in several instances by a proviso that the record of the deed absolute shall be of no effect unless the defeasance is also recorded;² and even by requiring the condition of defeasance to be embodied in the conveyance itself.³ However laudable the desire of the courts to prevent fraud, it cannot justify them in annulling the ordinary effect of the record as imparting notice of whatever appears on it; and in making its effect dependent on whether or not, as may be developed by subsequent proof, there is fraud, actual or constructive, in the instrument recorded. If fraud is permitted to vitiate not only the deed, but also the record thereof as imparting notice, it will be difficult to consistently maintain the rule that a subsequent innocent purchaser from a fraudulent grantee is to be protected by the operation of the recording acts. The character of absolute instruments, where they are intended or held to operate as a security, is often ascertained and determined after more or less litigation; and to apply the consequences of want of notice to a failure to register them as mortgages, would, as a rule, shock the conscience of any court.⁴

¹ Byrd v. Wilkinson, 4 Leigh, 266; Stearns v. Porter, 46 Conn. 313.

² This is the case in New York. Bank's Rev. Stats., pt. 2. ch. 2, §3; Maryland, Rev. Code of 1878, art. 66, §42; Delaware, Rev. Code, ch. 83, §18; Dakota, Civ. Code, §1740; also in Nebraska, New Jersey and California.

³ This is the case in New Hampshire. Gen. Laws of 1878, ch. 136, §2.

⁴ Kemper v. Campbell, 44 O. St. 210; s. c. 3 West. Repr. 620. In this case it was held that a deed absolute on its face, but in reality intended as only a security, was properly recorded as a deed; and in addition, that where recorded at any time within the six months allowed for the recording of deeds, it related back to the date of the instrument, al-

140. Filing for Record.

The effect of notice as given by some of the statutes to the mere act of filing or depositing an instrument for record, has been already considered.¹ The deposit of a conveyance with the recorder, with instructions not to place it on record until further directions, is not a filing for record; and when the instrument is recorded, its registry will date from the time of such last instructions, and not from the time it was delivered to the officer.² If recorded before such instructions are received, the record is not notice.³ The certificate or indorsement of the recorder is usually held sufficient and conclusive proof of the fact and date of filing, but not that the instrument was actually transcribed on the records.⁴ If the recorder

though no such privilege is allowed in that state to mortgages proper. Said Minshall, J.: "Transactions which in equity are construed as mortgages, arise under a great variety of forms, to many of which, if not all, it would be difficult to apply the statutes applicable to the registration of mortgages proper."

Under the New York Acts of 1883, ch. 279, a bill of sale duly filed has been held good as a mortgage, although the agreement that it should be a mortgage was in parol. *Preston v. Southwick*, 42 Hun. 291, Landon, J., dissenting.

In Georgia a deed absolute, although intended to secure a debt, and though there be a bond to re-convey, is not considered a mortgage, but passes the legal title; hence could be properly recorded only as a deed. *Keith v. Catchings*, 64 Ga. 773; *Thaxton v. Roberts*, 66 Ga. 704.

The Maryland statute requires an affidavit of *bona fides* to the record of mortgages, and the court held this to apply only to purely technical mortgages, not to deeds of trust nor to equitable mortgages. "A deed absolute on its face," said Eccleston, J., "if intended to be a mortgage, will be so declared by a court of equity, and I presume it will not be said that if such a deed is without the oath, it will be void under the act." *Charles v. Claggett*, 3 Md. 82; *Carson v. Phelps*, 40 Md. 73.

¹ See *ante*, §§16-18.

² *Town v. Griffith*, 17 N. H. 165; *Brigham v. Brown*, 44 Mich. 59; *Worcester Bank v. Cheeney*, 87 Ill. 602.

³ *Haworth v. Taylor*, 108 Ill. 275.

⁴ Where a deed was found in the register's office indorsed, "Registered April 28th, 1795," this was held *prima facie* evidence that it was filed for record at that date, although the clerk's name was not appended to such indorsement. *Parker v. Phillips*, 9 Cow. 94. The omission of the clerk to enter the fact of the record on the instrument will not invalidate or affect its registry. *Grice v. Haskins*, 77 Ga. 700. An instrument is notice from the time of its deposit, though the recorder neglects to mark it "filed." *Houghton v. Burnham*, 22 Wis. 301.

has failed to note the time at which the instrument was received, or the entry in the index book shows upon its face that it was not made at the time of such reception for record, parol evidence is admissible to show the true date.¹

§141. Filing and Withdrawal.

Where a deed has been filed for record, but is subsequently withdrawn from the office before it is recorded, the effect of the filing, and the priority it might have given, is destroyed.² Where a party filed his deed and afterwards withdrew it to be canceled and substituted by another deed of the same property, and then filed the new deed on the afternoon of the next day, it was held to have no priority over another deed of the property to another person filed in the forenoon just preceding.³ It is immaterial for what purpose the deed is withdrawn.⁴

"The record is the instrument of notice to subsequent purchasers of the state of the title, and to permit it in any manner to be affected by parol or extraneous evidence would not only destroy its value for that purpose, but would convert it into an instrument for deception." *Hatch v. Haskins*, 17 Me. 391. For further cases supporting the text, see *Ames v. Phelps*, 18 Pick. 314; *Worcester Bank v. Cheeney*, 87 Ill. 602; *Fuller v. Cunningham*, 105 Mass. 442; *N. Y. Life Ins. Co. v. White*, 17 N. Y. 469; *Bullock v. Wallingford*, 55 N. H. 619; *Dubose v. Young*, 10 Ala. 365; *Thorp v. Merrill*, 21 Minn. 336; *Wing v. Hall*, 47 Vt. 182; *Head v. Goodwin*, 37 Me. 181.

¹ *Metts v. Bright*, 4 Dev. & Bat. 173; s. c. 32 Am. Dec. 683; *Hay v. Hill*, 24 Wis. 285; *Boyce v. Stanton*, 15 Lea (83 Tenn.), 346; and even to show when a deed was recorded. *Horsley v. Garth*, 2 Gratt. 471; s. c. 44 Am. Dec. 393; *Gorham v. Summers*, 25 Minn. 81.

² *Johnson v. Borden*, 40 Vt. 567; s. c. 94 Am. Dec. 436; *Kiser v. Henston*, 38 Ill. 252; *Hickman v. Perrin*, 6 Cold. 135.

³ *Clamorgan v. Lane*, 9 Mo. 446. In Ohio it has been held that where the mortgagee withdraws a chattel mortgage from the recorder's office for a temporary purpose, the mortgage does not lose its lien thereby, nor will it be prejudiced by a levy made during such withdrawal of the same. *Wilson v. Leslie*, 20 Ohio, 161.

⁴ *Worcester Bank v. Cheeney*, 87 Ill. 602. But if such mortgage be withdrawn from the files wrongfully and without the mortgagee's authority, his lien is not affected and remains good against an attachment, especially where the attaching creditor had actual knowledge of the lien. *Swift v. Hall*, 23 Wis. 532. So where a mortgage was withdrawn and afterwards returned, but the clerk failed to make an entry, the mortgagee's lien was held not prejudiced by a levy made after such return, though the creditor did not know of it. *Woodruff v. Phillips*, 10 Mich. 500.

§142. Indexing.

The statutes usually provide that recorders shall keep proper alphabetical indexes of all instruments filed with them for record; the requirement sometimes including a general index besides those to be kept with each separate book or class of books. Where the statute did not require a general index, but the recorder kept one in accordance with custom, it was held that his failure to enter a conveyance in such general index was not a matter of which a subsequent purchaser could avail himself to avoid the effect of record notice of the instrument.¹ The index is for the convenience of persons searching the records,² but is not an essential part of the record, and while a failure to properly index an instrument may lay the officer liable to damages for such neglect,³ it does not vitiate the notice imparted by the record.⁴ The preponderance of decision and of reason is in favor of this view; but a contrary rule, based principally on the terms of the statute, prevails in several states, wherein it is held that the record is not complete so as to

¹ Schell v. Stein, 76 Pa. St. 398; Nichol v. Henry, 89 Ind. 54. The volume index may be kept separate, or bound in with the record book of which it is an index. Benton v. Nicholl, 24 Minn. 221.

² Chatham v. Bradford, 50 Ga. 327. A general index only, held sufficient. Oconto v. Jerrard, 46 Wis. 317.

³ Bishop v. Schneider, 46 Mo. 472; s. c. 2 Am. Rep. 533; Musgrove v. Bosner, 5 Or. 313.

⁴ Barrett v. Prentiss, 57 Vt. 297; Board v. Babcock, 5 Or. 472; Mutual Life Ins. Co. v. Dake, 1 Abb. N. C. 381; Bishop v. Schneider, *supra*; Green v. Carrington, 16 O. St. 548; s. c. 91 Am. Dec. 103; Chatham v. Bradford, *supra*; Gilchrist v. Gough, 63 Ind. 576; Lincoln v. Hass, 10 Neb. 581; Wade on Notice, §§164-169; Stockwell v. McHenry, 107 Pa. St. 237; s. c. 52 Am. Rep. 475; Swan v. Vogel, 31 La. Ann. 38; Semon v. Terhune, 40 N. J. Eq. 364, 367; Ely v. Wilcox, 20 Wis. 523; s. c. 91 Am. Dec. 436; Bedford v. Lupper, 30 Hun. 174; Devlin on Deeds, §§692-696.

"Every consideration of the subject and construction of the statute, founded on the convenience or inconvenience, real or supposed, of searching the records in the manner in which they are kept or indexed, is wholly impertinent, and, therefore, deceptive and liable to lead to error." Dixon, C. J., in Fallas v. Pierce, 30 Wis. 442. Arguments *ab inconvenienti* are out of place where the language of the law makes it plain. Inconveniences will result whichever way the question is decided. Mutual Life Ins. Co. v. Dake, *supra*.

impart constructive notice, until all the requirements of the law are fulfilled.¹

§143. Special Statutory Index.

Some of the statutes provide for an index so full in its details as to give, in addition to names and dates, a substantial description of the nature of the instrument and of the property conveyed by it.² A deed by mistake gave a wrong description of the property, but contained recitals sufficient to put a party on inquiry as to the mistake. The index, giving the erroneous description briefly, did not, of course, contain these recitals, and it was held that a subsequent purchaser was not charged with notice by the recitals, because not bound to go beyond the index.³ But where the record of the deed discloses a defect in the instrument not contradicted by or opposed to the index entries, as want of two witnesses where these are essential, it cannot be maintained that the index alone sufficiently imparts proper constructive notice, and such record is ineffectual.⁴ A description of the property in the appropriate column of the index as "certain lots of land," has been held sufficient.⁵

¹ *Barney v. McCarty*, 15 Iowa, 510; s. c. 83 Am. Dec. 427; *Barney v. Little*, *Id.* 527; *Sawyer v. Adams*, 8 Vt. 172; *Guinn v. Turner*, 18 Iowa, 1; *Speer v. Evans*, 47 Pa. St. 141. In this last case the decision of the point was not necessary in the case. See also, *Gillig v. Maas*, 28 N. Y. 191. A purchaser is not bound to look beyond the index for a recorded incumbrance. So held as to a mortgage by *Furman* indexed as *Freeman*. *Howe v. Thayer*, 49 Iowa, 154.

² Rev. Code of Iowa (1873), §1943; Rev. Stats. of Wisconsin (1878), §§759, 760; *Oconto v. Jerrard*, 46 Wis. 317.

³ *Scales v. Wilsey*, 11 Iowa, 261; and see also, *Howe v. Thayer*, *supra*; *Breed v. Conley*, 14 Iowa, 269; s. c. 81 Am. Dec. 485.

⁴ *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772; *Shepherd v. Burkhalter*, 13 Ga. 443; *Brown v. Kirkman*, 1 O. St. 116; *Oconto v. Jerrard*, 46 Wis. 317. And so, where the certificate of acknowledgment is defective, indexing does not suffice to charge notice. *Greenwood v. Jenswald*, 69 Iowa, 53. See also, *Peters v. Ham*, 62 Iowa, 656. Where the index is defective, there is no constructive notice until the deed is actually transcribed; but the presumption is that both were done at the same time. *Oconto v. Jerrard*, 46 Wis. 317.

⁵ *Bostwick v. Powers*, 12 Iowa, 456.

And so, even, where the words "see record" were written in the column where the description of the land should have been placed.¹ Whether this statutory indexing is absolutely essential to the record, depends much on the terms of the statutes. Usually its entire omission is fatal.²

¹ *White v. Hampton*, 13 Iowa, 259. Where the deed was duly recorded but the index gave a wrong township, range and section number from the true description, the addition of the words, "For description see record," did not cure the error so as to enable the record to impart constructive notice. *Breed v. Conley*, 14 Iowa, 269; s. c. 81 Am. Dec. 485.

Where the property was correctly described in the index, but through mistake in copying, there was an erroneous description of it in the record of the deed, the mistake was held immaterial as the index imparted the proper notice. *Shove v. Larsen*, 22 Wis. 142, citing *Flowers v. Wilkes*, 1 Swan, 408; *Merrick v. Wallace*, 19 Ill. 486.

The recorder omitted the name of the mortgagee in transcribing the instrument, but it appeared in the entry book, and the record was held to impart constructive notice. *Sinclair v. Slawson*, 44 Mich. 123; s. c. 38 Am. Rep. 235. A mortgage by husband and wife, of lands of the wife, was indexed under the name of the husband alone, and held sufficient. *Jones v. Berkshire*, 15 Iowa, 248. But where the deed conveyed two tracts, and only one was mentioned in the index, the record was notice only of that one. *Noyes v. Horr*, 13 Iowa, 570. A mortgagee from one whose deed recites a prior mortgage, is charged with notice of such prior mortgage, though it be not indexed. *Etna Life Ins. Co. v. Bishop*, 69 Iowa, 645; s. c. 29 N. W. Repr. 761.

In Texas a recorded abstract of judgment is not notice until indexed as required for such abstracts, although as to instruments generally the rule prevails in that state that they operate as notice from their filing for record. Rev. Stats., arts. 3157-3159; *Belbaze v. Ratto*, 69 Tex. 636; *Miller v. Koertge*, 70 Tex. 162; s. c. 7 S. W. Repr. 691.

² *Hendley v. Howe*, 22 Me. 560; *Holmes v. Sprowl*, 31 Me. 73; *Miller v. Koertge*, 70 Tex. 162. But see *Smith v. Waggoner* 50 Wis. 155; 9 Am. Law Rec. 358.

An omission to enter the description of the land under the appropriate head in the index, held to be cured by transcribing the deed in full in the records. *St. Croix Land Co. v. Ritchie* (Wis.), 41 N. W. Repr. 345; *Oconto v. Jerrard*, 46 Wis. 317; except where there are no entries at all in the index. *Lombard v. Culberson*, 59 Wis. 537; s. c. 18 N. W. Repr. 399. In the absence of proof, it will be presumed that the transcribing and indexing were done at the same time. *Lane v. Duchac*, (Wis.), 41 N. W. Repr. 962. See further as to indexing, *Paige v. Lindsey*, 69 Iowa, 593; s. c. 29 N. W. Repr. 615. Where a chattel mortgage was filed, but was not indexed until the next day, an intervening attachment lien took precedence. *Hibbard v. Zenor* (Iowa), 39 N. W. Repr. 714; Code of Iowa, §1925.

§144. Delivery.

As a rule, delivery of a deed or other instrument is essential to its valid registration,¹ for the reason that until delivery the deed is incomplete, and its record cannot impart constructive notice of a change of ownership that has not occurred.² The record of a deed without any knowledge of it on the part of the grantee is not equivalent to delivery,³ unless it be shown that on being informed of it he assented to it, in which case the record will be notice from the time of such assent,⁴ or from the time of the delivery of the instrument to the grantee, if delivered subsequent to its record.⁵ In some cases of mortgages given to secure a pre-existing debt, the assent of the mortgagee has been presumed, and the record held, as against other cred-

¹ Weber v. Christen, 121 Ill. 91; s. c. 2 Am. St. Rep. 68; 11 N. E. Repr. 793; Sampson v. Thornton, 3 Metc. 275; Jackson v. Phipps, 12 Johns. 418.

² Parker v. Hill, 8 Metc. 447; Wade on Not., §141; Fitzgerald v. Goff, 99 Ind. 28; Wood v. Ingraham, 3 Strobh. Eq. 105; s. c. 51 Am. Dec. 671; Woodbury v. Fisher, 20 Ind. 387; s. c. 83 Am. Dec. 325.

Where the deed of a father to his son remained in the house of both for seven years, and was recorded after the father's death, *held* not good against creditors of the father's estate, or purchasers at the administrator's sale, without proof of actual delivery in the father's lifetime. Lank v. Hiles, 4 Houst. (Del.), 87; and to same effect, Peterson v. Kilgore, 58 Tex. 88; Durand's Appeal, 116 Pa. St. 93; s. c. 8 Atl. Repr. 922. A delivery to a third person, to be recorded after the death of the grantor, has been held sufficient. Hinson v. Bailey, 73 Iowa, 544; s. c. 5 Am. St. Rep. 700; 35 N. W. Repr. 626; Smiley v. Smiley, 114 Ind. 258; s. c. 16 N. E. Repr. 585; but see Scott v. Scott, 95 Mo. 300; s. c. 8 S. W. Repr. 161.

³ Day v. Griffith, 15 Iowa, 104; Weber v. Christen, *supra*; National Bank v. Morse, 73 Iowa, 174; s. c. 5 Am. St. Rep. 670; 34 N. W. Repr. 803; Woodbury v. Fisher, *supra*; Herbert v. Herbert, Breese, 354; s. c. 12 Am. Dec. 192; Parmelee v. Simpson, 5 Wall. 81.

Recording is *prima facie* delivery. Stevens v. Castel, 63 Mich. 111; Tobin v. Bass, 85 Mo. 654; Deere v. Nelson, 73 Iowa, 186; Standiford v. Standiford (Mo.), 10 S. W. Repr. 836; Patrick v. Howard, 47 Mich. 40; Conlan v. Grace (Minn.), 30 N. W. Repr. 880; Millaudan v. Allord, 2 La. Ann. 551. And may sufficiently indicate the intent of the grantor. Love v. Francis, 63 Mich. 181. *Contra*, recording is not sufficient. McGraw v. McGraw, 79 Me. 257. See cases in last note to this section.

⁴ Parker v. Hill, 8 Metc. (49 Mass.), 447; Farmer's Bank v. Drury, 38 Vt. 426; and cases *supra*.

⁵ Jones v. Roberts, 65 Me. 273; Carnall v. Duvall, 22 Ark. 136.

itors, to be effectual from its date.¹ Possession by the grantee of an acknowledged deed is *prima facie* evidence of delivery,² and in the absence of proof, it will be presumed to have been delivered at the date of its execution and acknowledgment.³ Where the date of the deed is prior to that of the acknowledgment, the presumption of delivery, in some states, still attaches to the date of the instrument,⁴ while in others it is presumed to have been delivered at the date of acknowledgment.⁵ If there are conditions precedent to be performed before the sale is to be complete and binding on the grantee, the record of the

¹ *Merrills v. Swift*, 18 Conn. 257; *Ensworth v. King*, 50 Mo. 447; *Milaudan v. Allord*, 2 La. 551; *Hill v. Barlow*, 6 Rob. 142. This law, however, is doubted. See *Jones on Mort.*, §540; *Johnson v. Farley*, 45 N. H. 505; *Jones on Chat. Mort.*, §§104-113.

Where a mortgagor delivered the mortgage to the register to be recorded on the happening of a certain contingency which never arose, but the register recorded it, and returned it to the mortgagor, who wrote to the mortgagee that he had secured the debt by mortgage as agreed, and afterwards, on being declared a bankrupt, scheduled the mortgage to the secured creditor, a finding of a delivery of the mortgage was sustained. *Nazro v. Ware*, 38 Minn. 443; s. c. 33 N. W. Repr. 359, citing *Conlan v. Grace*, 36 Minn. 281; s. c. 30 N. W. Repr. 880.

² *Scott v. Scott*, 95 Mo. 300; s. c. 8 S. W. Repr. 161; *Reed v. Douthit*, 62 Ill. 348; *Tuttle v. Turner*, 28 Tex. 759; *Kedder v. Stevens*, 60 Cal. 414; *Houston v. Stanton*, 11 Ala. 412; *Billings v. Stark*, 15 Fla. 297; *Boody v. Davis*, 20 N. H. 140; s. c. 51 Am. Dec. 210; *Brittain v. Work*, 13 Neb. 347.

³ *Purdy v. Coar*, 109 N. Y. 448, s. c. 4 Am. St. Rep. 491; *Bruce v. Slemph*, 82 Va. 352; *Alexander v. DeKernel*, 81 Ky. 345; *Hardin v. Osborne*, 60 Ill. 93; *Raines v. Walker*, 77 Va. 92; *McConnell v. Brown*, Litt. Sel. Cas. 462; *Burke v. Adams*, 80 Mo. 504; s. c. 50 Am. Rep. 510; *Speed v. Brooks*, 7 J. J. Marsh. 119; *Windom v. Schappeil* (Minn.), 38 N. W. Repr. 757; *Ellsworth v. Cent. Ry. Co.*, 34 N. J. L. 93.

⁴ *Darst v. Bates*, 51 Ill. 439; *Harden v. Crate*, 78 Ill. 573; *Ward v. Dougherty*, 75 Cal. 240; *People v. Snyder*, 41 N. Y. 402; and see *Breckinridge v. Todd*, 3 Mon. 52; s. c. 16 Am. Dec. 83; 1 Dev. on Deeds, §265; *Hardy v. Norfolk*, 80 Va. 404, citing *Raines v. Walker*, 77 Va. 92; *Harman v. Oberdorfer*, 33 Gratt. 497; *Chaffe v. Halpin*, 62 Miss. 1.

⁵ *Blanchard v. Tyler*, 12 Mich. 339; *Clark v. Akers*, 16 Kan. 166; *Loomis v. Pingree*, 43 Me. 299; *Fontaine v. Boatmen's Bank*, 57 Mo. 553.

Where the date of the acknowledgment was long prior to the date of the deed, it was presumed that the officer certified the date correctly as required by the statute. *Cover v. Manaway*, 115 Pa. St. 338; s. c. 2 Am. St. Rep. 552.

deed, even with the grantee's knowledge thereof, has been held ineffectual where there was a failure of the required conditions.¹ The recording of a deed is not equivalent to delivery, but, like possession of it, is *prima facie* evidence of that fact, subject to be overcome by contrary proof.²

§145. Attesting Witnesses.

In a number of states attesting witnesses are essential to a deed or mortgage, even though it be acknowledged.³ Where this is the case, or where by the terms of the statute witnesses are made a pre-requisite to registry, the record of a deed without the required number of witnesses will not impart constructive notice,⁴ even though the defect be not apparent on the face of the instrument, as where one of the two witnesses was disqualified because she was the wife of the grantor.⁵ The record will not be aided by the fact

¹ Leppoc v. Union Bank, 32 Md. 136, cited at length in 1 Dev. on Deeds, §293.

² Peterson v. Kilgore, 58 Tex. 88; Fletcher v. Horne, 75 Ga. 134; Moody v. Dryden, 72 Iowa, 461; Younge v. Gilbeau, 3 Wall. 636; Metcalfe v. Brandon, 60 Miss. 685; Knolls v. Barnhart, 71 N. Y. 474. Recording is equivalent to delivery in the absence of fraud in the grantor. Levy v. Cox, 22 Fla. 546, 580; Hammell v. Hammell, 19 Ohio, 17; Jefferson Co. v. Heil, 81 Ky. 513.

³ Under Rev. Stats. of La., §§596-603, acts acknowledged before a Louisiana commissioner have no effect, unless the acknowledgment take place before two competent witnesses. Leibe v. Hebersmith, 39 La. Ann. 1050; s. c. 3 South. Repr. 283.

Under Comp. Laws of Utah, p. 255, §9, an acknowledged deed without witnesses does not convey title. Tarpey v. Desert Salt Co., 14 Pac. Repr. 338, citing U. S. v. Crosby, 7 Cranch, 115; Townsend v. Little, 109 U. S. 512; Kingsley v. Holbrook, 45 N. H. 320; Crane v. Reeder, 21 Mich. 60; Winsted v. Spencer, 26 Conn. 195. Where two attesting witnesses were required, and only one signed in the usual place, but an additional witness signed, with the grantor, a memorandum of the insertion of an omitted word, this was held sufficient. Culbertson v. Witbeck Co., 127 U. S. 326; s. c. 8 Sup. Ct. Repr. 1136.

⁴ Gardner v. Moore, 51 Ga. 268; Morrill v. Morrill, 60 Vt. 74; Galpin v. Abbott, 6 Mich. 17; Ross v. Worthington, 11 Minn. 438; s. c. 88 Am. Dec. 95; Thompson v. Morgan, 6 Minn. 292; White v. Denman, 16 Ohio, 59; s. c. 1 O. St. 110; Frostburg v. Brace, 51 Md. 508; Harper v. Barsh, 10 Rich. Eq. 149; N. Y. Life Ins. Co. v. Staats, 21 Barb. 570; Potter v. Strausky, 48 Wis. 235; Hastings v. Cutler, 24 N. H. 481; Batte v. Stone, 4 Yerg. 168.

⁵ Carter v. Champion, 8 Conn. 549.

that the instrument is properly indexed where the lack of witnesses is not contradictory of any of the recitals in the index.¹ The rule has also been applied to a case where the deed in fact had the requisite number of witnesses, but the record, through mistake in copying, failed to show that fact.²

§146. Sealing and Signing.

In a majority of the states the use of private seals has been wholly dispensed with by statute. Where it is required that an instrument shall be under the seal of the grantor or maker, it has been held that the record of a deed without the seal is of no effect.³ The courts, however, are not disposed to attach such effect to the omission of the mere formality of a scrawl that now usually constitutes the seal; and upon the ground that equitable titles are embraced within the registry acts, and that an instrument without seal conveys the equitable title, the record in such cases has been sustained.⁴

If the record show the deed to be without signature, it will be ineffectual, though the instrument was in fact prop-

¹ *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772, citing *Bishop v. Schneider*, 46 Mo. 472; s. c. 2 Am. Rep. 533.

² *Parrett v. Shaubhut*, 5 Minn. 323; s. c. 80 Am. Dec. 424. The later statute of 1872 is different. *Moreland v. Laurence*, 23 Minn. 84. In Alabama, a deed without either witnesses or acknowledgment is void. *Hendon v. White*, 52 Ala. 597, citing *French v. French*, 3 N. H. 234; *Clark v. Graham*, 6 Wheat. 577. See *McGowan v. Reid*, 27; S. Car. 262.

³ *Racouillat v. Sausevain*, 32 Cal. 376; *Racouillat v. Rene*, *Id.* 450. See *Wallace v. Moody*, 26 Cal. 387.

Where a sheriff's deed was signed, acknowledged and recorded, without sealing, its subsequent sealing, without re-acknowledgment, was held not to make it available to protect the purchaser under it in an action brought for the land. *Lessee of Merritt v. Home*, 5 O. St. 307.

If the instrument was properly sealed when executed, the subsequent detachment of the seal does not invalidate it, unless it be proved that the seal was detached before the instrument reached the clerk's office for record. *Van Riswick v. Goodhue*, 50 Md. 57.

⁴ *McClurg v. Phillips*, 57 Mo. 214; *Portwood v. Outton*, 3 B. Mon. 247; *Harrington v. Fortner*, 58 Mo. 468; *Brydon v. Campbell*, 40 Md. 331; *Wade on Notice*, §140.

erly signed,¹ and so, where the name of the grantee is not inserted in the instrument.²

§147. Description of the Property.

The record of an instrument will not impart notice, unless it contains a sufficient description of the property conveyed or affected. In determining what will constitute a sufficient description, both the character of the instrument and of the property are to be taken into consideration. In a power of attorney, for instance, the description may be in very general terms. The record of deed or mortgage is ineffectual unless it contains an appropriate description of the property attempted to be conveyed.³ Where there is no uncertainty on the face of the instrument, but, through mistake, a different property is described from that intended to be conveyed, the record is notice of a conveyance or incumbrance only of the property mentioned.⁴ But where an imperfect or erroneous description is given in such manner as to reasonably put one on an inquiry as to the property intended to

¹ *Shepherd v. Burkhalter*, 13 Ga. 443; s. c. 58 Am. Dec. 523. Where the record showed no corporate seal to the instrument, it was presumed there was none, although there was some evidence tending to show it had been attached. *Todd v. Union Dime Sav. Inst.*, 20 Abb. N. Cas. 270. If the corporate seal appears, evidence of the officer who usually attaches it, that he has no recollection of doing so, is unavailing. *Parker v. Washoe Mfg. Co.*, 49 N. J. L. 465; s. c. 9 Atl. Repr. 682; 8 Cent. Repr. 343.

² *Disque v. Wright*, 49 Iowa, 538, citing *Chauncey v. Arnold*, 24 N. Y. 330. A palpable mistake in filling blanks, whereby the name of the mortgagor is written for that of the mortgagee, and *vice versa*, will not prevent the record from being notice of the mistake to subsequent purchasers from the mortgagor. *Beaver v. Slanker*, 94 Ill. 175; 1 Jones on Mort., §530.

³ *Warren v. Syme*, 7 W. Va. 474; *Eggleston v. Watson*, 53 Miss. 339; *Wright v. Lancaster*, 48 Tex. 250; *Bank v. Ammon*, 27 Pa. St. 172; *Mundy v. Vawter*, 3 Gratt. 518; *Nelson v. Wade*, 31 Iowa, 49; *Murphy v. Hendricks*, 57 Ind. 593; *Porter v. Byne*, 10 Ind. 146; s. c. 71 Am. Dec. 305; *Chamberlain v. Bell*, 7 Cal. 292; s. c. 68 Am. Dec. 260; *Holloway v. Platner*, 20 Iowa, 121; s. c. 89 Am. Dec. 517; *Adams v. Edgerton*, 48 Ark. 419; 3 S. W. Repr. 628; *Green v. Witherspoon*, 37 La. Ann. 751.

⁴ *Sanger v. Craigie*, 10 Vt. 555; *Lally v. Holland*, 1 Swan, 396; *Thorp v. Merrill*, 21 Minn. 336.

be conveyed that would lead to a correct knowledge of the matter, the record will charge notice.¹ So, where there is in a recorded instrument a reference to some other matter of record by which a defective description will be aided and made certain, the record will impart notice.² The application of these rules depends largely on the facts of the individual cases, and there is a noticeable lack of harmony in the decision of cases of this kind.³ This matter will be considered more in detail hereafter in treating of the effect of registry.⁴

§148. Recording Officers.

The registration of a conveyance is a purely ministerial act, and an officer is not disqualified from recording a deed

¹ *Carter v. Hawkins*, 62 Tex. 393; *Anderson v. Baughman*, 7 Mich. 69; *Nye v. Moody*, 70 Tex. 434; *Partridge v. Smith*, 2 Biss. 183; *Thornhill v. Burthe*, 29 La. Ann. 639; *Roberts v. Bauer*, 35 La. Ann. 453; *Tousley v. Tousley*, 5 O. St. 78; *Erickson v. Rafferty*, 79 Ill. 209; *Merrick v. Wallace*, 19 Ill. 486, 498; *Dargin v. Becker*, 10 Iowa, 571.

"The east half of lot 20 in G., it being the west half of said lot 20," is such a description as serves to put on inquiry. *Carter v. Hawkins*, *supra*; and see *Thornhill v. Burthe*, 29 La. Ann. 639.

Actual notice of the mistake renders the error in the record immaterial. *Bent v. Coleman*, 89 Ill. 364; s. c. 7 Am. Rep. 366; *Warburton v. Lauman*, 2 Greene, 420.

² *Wallace v. Furber*, 62 Ind. 103; *Newman v. Tymeson*, 13 Wis. 172; s. c. 80 Am. Dec. 735. Where a deed referred to a recorded contract of sale under which it was made, and that contract referred to another one not recorded, it was held that a subsequent purchaser was bound by the terms of those contracts. *Cent. Investment Co. v. Wabash*, 29 Fed. Repr. 546. And see *Gibert v. Peteler*, 38 N. Y. 165; s. c. 97 Am. Dec. 785.

³ Where "lot one in block six," was described in a deed as "lot and six," it was held that a subsequent purchaser under judicial sale against the grantor was entitled to priority over the grantee in the deed, unless at the time of his purchase he had such notice as would put a prudent man on inquiry. *Nelson v. Wade*, 21 Iowa, 49.

In Connecticut it has been held that a mortgage of real estate requires a more certain and definite description of the property than a deed; and a general designation of all other lands owned by the mortgagors in a certain township, with reference to the county records for description, has been adjudged insufficient. *Herman v. Deming*, 44 Conn. 124, cited at length in 1 Dev. on Deeds, §654.

⁴ *Post*, §§178-183.

because he is a party to it, unless the statute so provides.¹ It is sufficient that a deed is deposited for record with a person who is in actual charge and custody of the office, whether he be a regular deputy or not, as the recorder is responsible for the acts of one thus permitted to have control of the office and records.² Where the clerk is required to keep a record of acknowledgments, his failure to enter a certificate thereon is immaterial where the instrument is duly recorded.³ The certificate of the recorder is in some states held conclusive evidence that the instrument to which it is attached has been properly recorded.⁴ A recorder of mortgages giving a certificate that the records are clear, is responsible on his bond for the amount of a mortgage made on the faith of the certificate, and lost because of a prior recorded mortgage.⁵

§149. Schedules, Memoranda, etc.

Schedules annexed to a deed of trust and referred to therein, must be registered with it.⁶ Where a memorandum

¹ Brockenborough v. Melton, 55 Tex. 493; Tessier v. Hall, 7 Mart. (La.), 411.

² Cook v. Hall, 6 Ill. (1 Gilm.), 575. A clerk in the store of the town clerk, and in charge of the town clerk's office may, in the officer's absence, receive and file a mortgage. Dodge v. Potter, 18 Barb. 193; and so of a person in charge of the recorder's office during a vacancy. Bishop v. Cook, 13 Barb. 326. Where a person made an entry on the books of the entry taker (of public lands), and in his presence, but without his authority, it was held void, and not constructive notice to subsequent parties. Pearson v. Powell, 100 N. C. 86, citing Maxwell v. Wallace, 3 Ired. Eq. 593.

³ Scruggs v. Scruggs, 41 Mo. 242. *Aliter* as to acknowledgments taken by justices in Illinois. Koplin v. Anderson, 83 Ill. 120; Frank v. Miner, 50 Ill. 444; Porter v. Dement, 35 Ill. 478.

⁴ Jacobs v. Denison, 141 Mass. 117; Anthony v. Butler, 13 Pet. 423; *post*, §272; *contra*, Johnson v. Burden, 40 Vt. 567; s. c. 94 Am. Dec. 436.

⁵ Fox v. Thibault, 33 La. Ann. 32. So, a notary and the sureties on his bond held liable for loss, because of a false certificate to a mortgage which proved to be a forgery. People v. Butler (Mich.), 42 N. W. Repr. 243. A certified copy by a notary of a deed acknowledged before him is not valid. Sparr v. Trimble, 1 Marsh. 279. Otherwise as to copies of notarial and public acts of sale under the Mexican civil law. Titus v. Kimbro, 8 Tex. 210.

⁶ Sawyer v. Pennell, 19 Me. 167; McKinnon v. McLean, 2 Dev. & Bat. 79. A schedule merely referred to in a mortgage, but not annexed to

is indorsed on a deed, but not referred to in it, the memorandum must be acknowledged, and without this its record with the deed is ineffectual.¹

§150. Manner of Record.

Marginal notes of a recorder to the record of a deed cannot affect its validity, and are not proof.² Where the deed has been recorded in another county, it is not necessary that the clerk should copy the certificate of such prior record.³ Unless the statute require it, the record need not be signed by the officer in order that a copy of the deed may be admissible in evidence.⁴ The record is not vitiated by an omission to copy the official seal to the certificate of acknowledgment, or to indicate in some way that there was a

it, or made part of it, need not be recorded. *Chapin v. Cram*, 40 Me. 561. That the field-notes of a deed were attached to it after its record, held not to lessen its effect as a recorded instrument. *Nye v. Moody*, 70 Tex. 434; s. c. 8 S. W. Repr. 606.

¹ The memorandum was indorsed underneath the certificate of acknowledgment, and the lower court instructed the jury that if it was there at the time of the execution of the deed, it was legally recorded. This was held error. *Kerns v. Swope*, 2 Watts. 75; and to same effect, *McKean v. Mitchell*, 35 Pa. St. 269; s. c. 78 Am. Dec. 335.

An additional agreement making the right to foreclose a mortgage dependent on a given contingency must be recorded, under Rev. Stats. of Mo., §693. *Munson v. Ensor* (Mo.), 7 S. W. Repr. 108.

A map pasted in the record book between its leaves, has been held to be not thereby recorded. *Caldwell v. Center*, 30 Cal. 539; s. c. 89 Am. Dec. 131. A plat referred to in a deed, but not annexed to or recorded with it, is not notice. *Shirras v. Caig*, 7 Cranch, 34.

Where new conditions, duly acknowledged, are indorsed on the back of a recorded mortgage, in recording the new conditions, it is not necessary to again record the mortgage, if they so refer to it as to identify it. *Choteau v. Thompson*, 2 O. St. 114. Reference to a schedule attached to another mortgage recorded in the same office, held sufficient. *Newman v. Tymeson*, 13 Wis. 172; s. c. 80 Am. Dec. 735; and see *Dunham v. Dey*, 15 Johns. 555; s. c. 8 Am. Dec. 282.

² *Doe, lessee of Foster, v. Executors of Dugan*, 8 Ohio, 87; s. c. 31 Am. Dec. 432; *Farmer's Bank v. Bronson*, 14 Mich. 363.

³ *Stinnett v. House*, 1 Tex. Un. Cas. 484. Clerical errors in transcribing do not vitiate the record. *Gillespie v. Brown*, 16 Neb. 457; s. c. 20 N. W. Repr. 632.

⁴ *Wilt v. Cutler*, 38 Mich. 189. The record may be partly printed without vitiating. *Maxwell v. Hartman*, 50 Wis. 660.

seal to the original.¹ But if there is no recital in the certificate that the seal is attached, and a certified copy be offered in evidence having no indication of a seal thereon, the presumption must necessarily obtain that there was no seal to the original.² In the indorsement to be made by the recorder on the instrument, a substantial compliance with the statute is sufficient.³ The clerk may correct mistakes in the record, as by subsequent interlineations, but such corrections can in no way impair title already acquired, and take effect only from the time when made.⁴ An omission to copy part of a mortgage instrument, the part omitted not pertaining directly to the mortgage, does not vitiate the record.⁵ A recorder is not liable in damages for recording a forged deed, unless he knew the character of the instrument.⁶ Where the statute limits the damages for failure to properly discharge a mortgage to "ten dollars and all damages occasioned by the neglect to so discharge it," exemplary damages resulting from defendant's false declarations as to the mortgage, are not recoverable.⁷ The validity of the instrument is not a matter to be determined by the clerk before he will record it.⁸ Deeds should be recorded without blank spaces left between on the record.⁸ As against the officer's certificate of record on the deed, a witness not in charge of the recording office will not be heard to testify that no such deed was recorded; the testimony of such officer being the best evidence of that fact, if the certificate is not to be regarded as conclusive.⁹

¹ *Geary v. City of Kansas*, 61 Mo. 378; *Sneed v. Ward*, 5 Dana, 188; *Gronning v. Belin*, 10 B. Mon. 386; *Smith v. Dall*, 13 Cal. 510; *Jones v. Martin*, 16 Cal. 166; *Griffin v. Sheffield*, 38 Miss. 359; s. c. 77 Am. Dec. 646; *Ballard v. Perry*, 28 Tex. 347, 364; *Addis v. Graham*, 88 Mo. 197.

² *Switzer v. Knapps*, 10 Iowa, 72; s. c. 74 Am. Dec. 375.

³ *Parsons v. Boyd*, 20 Ala. 112.

⁴ *Chamberlain v. Bell*, 7 Cal. 292; s. c. 68 Am. Dec. 260; *Baldwin v. Marshall*, 2 Humph. 116; *Harrison v. Wade*, 3 Cold. 505; *Sellers v. Sellers*, 98 N. C. 13; s. c. 3 S. E. Repr. 917.

⁵ *Est. of Prudhomme*, 35 La. Ann. 984.

⁶ *Ramsey v. Riley*, 13 Ohio, 157.

⁷ *Giffin v. Barr*, 60 Vt. 599.

⁸ *Sacerdote v. Duralde*, 1 La. 485.

⁹ *Edwards v. Barwise*, 69 Tex. 84; s. c. 6 S. W. Repr. 677; *Bullock v. Wallingford*, 55 N. H. 619. By statute in Ohio, a certified copy of a re-

§151. Payment of Recording Fees.

A provision in the statute that "no deed shall be admitted to record until the tax is paid thereon," is merely directory. If the officer records the deed without the payment of the tax, the record is not invalid, but he assumes the tax.¹ So, if he sees proper to waive his right to the prepayment of his fees, he must record the deed and look for payment to the person depositing it for record.² A mortgagee cannot, in the absence of an agreement to that effect, hold the mortgagor liable for the payment of the fee for recording the mortgage, as its registration is solely for his benefit and protection.³ Records are subject to public inspection, but if the services of the officer are in any way required, he is entitled to charge a fee; hence it is held in Georgia that no one is entitled to examine the records and make abstracts without the payment of any fee.⁴

recorded instrument is *prima facie* of the instrument, and conclusive evidence of its record. Rev. Stats., §4143. And usually so by decision. *Fuller v. Cunningham*, 105 Mass. 442; *Head v. Goodwin*, 37 Me. 181; *ante*, §140.

¹ *Lucas v. Claflin*, 76 Va. 269; *Hoffman v. Mackall*, 5 O. St. 124; s. c. 64 Am. Dec. 637.

² *Ridley v. McGee*, 2 Dev. 40; *Bussing v. Crain*, 8 B. Mon. 593; *People v. Bristol*, 35 Mich. 28; *Dodge v. Potter*, 18 Barb. 193.

³ *Simon v. Sewell*, 64 Ala. 261.

Where a deed has been filed and the recording fees paid, it will be presumed that the clerk did his duty and recorded it—the deed being lost and the record thereof burned. *Harrison v. McMurray* (Tex.), 8 S. W. Repr. 612; and see also, *Perkins v. Strong*, 22 Neb. 725.

For case where, because of non-payment of the tax, or fee, the record was held not to impart notice, see *Phillips v. Clarke*, 4 Met. 348; s. c. 83 Am. Dec. 471.

A deed lodged for record passes title, though not recorded because the fee is not paid. *Knight v. Williams*, 6 Bush, 51; s. c. 99 Am. Dec. 652. Where a deed is sent to the recorder without the fees, it is not "lodged for record." *Dickerson v. Bowers*, 42 N. J. Eq. 295; s. c. 11 Atl. Repr. 142; 7 Cent. Repr. 372.

A stipulation in the mortgage that the mortgagor binds himself to pay all costs of recording and foreclosure, is valid, and the lien is good for such costs. *Boutwell v. Steiner*, 84 Ala. 307; s. c. 5 Am. St. Rep. 375.

⁴ *Buck v. Collins*, 51 Ga. 391; s. c. 21 Am. Rep. 236.

CHAPTER 7.

THE EFFECT OF RECORD.

- §152. Effect of the record—Constructive notice.
- 153. Continued—Definitions and limitations.
- 154. Purchaser may rely on title as it appears of record.
- 155. Purchaser without notice may convey title to one with notice.
- 156. When full record title does not protect purchaser in good faith.
- 157. Continued—The contrary view under which such purchaser is protected.
- 158. Break in the record title.
- 159. Continued—Actual notice as supplying the gap.
- 160. Record of mortgage before deed to mortgagor.
- 161. Continued—Exception created by estoppel.
- 162. Record is notice only to purchasers under same grantor.
- 163. Record does not charge prior parties.
- 164. Continued—Record of subsequent mortgage as notice to prior parties.
- 165. Priority in registration.
- 166. Priority in the record of conveyances from same grantor.
- 167. Priority—Continued.
- 168. Conveyances and records of same date.
- 169. Priority in record of liens.
- 170. Priority in record of mortgages.
- 171. Continued—Record of mortgages.
- 172. Purchase money mortgages.
- 173. Re-inscription of mortgages.
- 174. Assignment of mortgages.
- 175. Cancellation, release and discharge of mortgages.
- 176. Extent to which the record is notice.
- 177. Continued—Notice of matter of law.
- 178. Recitals charge constructive notice.
- 179. Notice from unusual recitals.
- 180. Imperfect and ambiguous recitals.
- 181. Recital to other instruments.
- 182. Recitals to matter of fact.
- 183. Quit-claim deed as charging with notice.
- 184. Purchaser from heir protected.
- 185. Registry of wife's separate property.

- §186. Record of conveyances by the wife.
- 187. Second record not necessary.
- 188. Registry as affected by usage.
- 189. Record necessary to the validity of the instrument, when.
- 190. Unauthorized record made effective by subsequent matter of law or fact.
- 191. Unrecorded deed as affected by suit.

§152. Effect of the Record—Constructive Notice.

The statutes usually provide that unrecorded conveyances and other instruments affecting title shall be void as against subsequent purchasers and incumbrancers without notice; but only a few of them expressly declare that registry shall constitute notice. The construction of the English and Irish registry acts has been that they were intended to give priority to conveyances according to the priority of their registry, but that registry did not, of itself alone, constitute or impart notice.¹ At an early day the same view also prevailed to some extent in this country,² but the doctrine that now universally obtains throughout the United States, is that a proper record is constructive and absolute notice, charging every person subsequently dealing with the property involved, whose duty it is to make examination of the records.³ The duty of examination proceeds on the theory

¹ *Ford v. White*, 16 Beav. 120, and cases cited *ante*, §2. "The plain meaning of the statute," said Lord Redesdale, in *Underwood v. Lord Courtown*, 2 Sch. & Lef. 40, "is to give priority to instruments whether they convey a legal or equitable estate, according to the priority of their registry." The statutes of Pennsylvania, Maryland, Rhode Island and several other states are modeled on the statute of 27 Henry VIII, for the enrolment of bargains and sales, or that of 7 Anne, ch. 20, *ante*, §1. By the statutes of a majority of the states, however, it is not required that a subsequent conveyance, in order to claim preference, shall be first of record, and where this is not so nominated in the statute, the rule does not obtain, except as to certain classes of mortgages, that priority of right depends on priority of record. See *ante*, §§13-15; *post*, §§165-167.

² *Doswell v. Buchanan*, 3 Leigh, 365; s. c. 23 Am. Dec. 280, and cases cited *ante*, §3; *post*, §203.

³ *Sowden v. Craig*, 26 Iowa, 156; s. c. 96 Am. Dec. 125; *Wells v. Smith*, 2 Utah, 39; *Parkist v. Alexander*, 1 Johns. Ch., 394; *Humphreys v. Newman*, 51 Me. 40; *Ogden v. Walters*, 12 Kan. 282; *ante*, §4; 2 Pom. Eq. Jur., §665; 1 Jones on Mort., §557.

that the records are made for public information, and that one who willfully or negligently omits to inform himself of what they disclose, is in equity and reason as much chargeable with notice as though he knew.¹ Where the letter of the law has not given this effect of notice to registration, the courts have done so by judicial construction, and they have declared, in reference to this most important consequence of recording, that the registry laws would be useless, unless subsequent purchasers were bound to take notice of an instrument previously and duly recorded.²

§153. Continued—Definitions and Limitations.

The constructive notice imparted by registry is absolute and conclusive; hence it will avail nothing, where a deed has been duly recorded, that a subsequent purchaser actually searched the records without finding it.³ That constructive notice which arises from matters of fact sufficient to put one on inquiry, is usually rebuttable.⁴ This latter character of notice, which is more properly implied or presumptive notice, will be treated under the head of Actual Notice, in a succeeding chapter.⁵ In their legal consequences and effect there is no difference between actual notice and constructive notice of either kind.⁶ The determination of

¹ *Acer v. Westcott*, 46 N. Y. 384; s. c. 7 Am. Rep. 355; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Wild v. Brooks*, 10 Minn. 50; *Wilson v. Hunter*, 30 Ind. 466; *ante*, §4.

² *Voorhis v. Westervelt*, 43 N. J. Eq. 642; s. c. 12 Atl. Repr. 533; 3 Am. St. Rep. 315; *McPherson v. Rollins*, 107 N. Y. 316; s. c. 1 Am. St. Rep. 826; 14 N. E. Repr. 411; *Buchanan v. Int. Bank*, 78 Ill. 500; *Earle v. Fisk*, 103 Mass. 491, 494; *Hager v. Spect*, 52 Cal. 579; *Orvis v. Newell*, 17 Conn. 97.

³ *Edwards v. Barwise*, 69 Tex. 84; s. c. 6 S. W. Repr. 677; *Jordan v. Farnsworth*, 15 Gray, 517; *Clabaugh v. Byerly*, 7 Gill. 354.

⁴ "The presumption is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part." *Selden, J.*, in *Williamson v. Brown*, 15 N. Y. 554; *Wilson v. Williams*, 25 Tex. 54; *Wade on Not.*, §40; *Story's Eq. Jur.*, §410a; *post*, §227.

⁵ *Post*, ch. 9, §§219-227.

⁶ *Hill v. Epley*, 31 Pa. St. 335; *Schutt v. Large*, 6 Barb. 373; *Morrison v. Kelley*, 22 Ill. 610; s. c. 94 Am. Dec. 169; *Ellison v. Wilson*, 36 Vt. 67.

the effect of the record when made involves the most important and difficult questions of registration. These questions arise not from exceptions to the rule that the record imparts absolute notice, but from difficulties to be found in making a proper application of the rule to specific cases and classes of instruments, and they grow largely out of peculiarities of the various instruments, deficiencies of description and recital therein, and the nature of their relations to other matters of record and *in pais*.¹ Actual notice may be limited in its operation by the facts in a given matter, but the constructive notice of the record, being absolute and arbitrary, is not usually susceptible in its application to such limitations and qualifications as equity might suggest in that "apportionment of injuries" which has been said to be the object of the law. Ordinarily the record is notice, or it is nothing. Cases of this kind, where the rights of litigants are thus dependent on the application of an arbitrary rule, "are always very honorably labored by counsel at the bar, and determined with great anxiety by the court, as some of the parties must be shipwrecked in the event."²

It may be stated, as a general rule, that constructive notice flowing exclusively from matters of record will not be construed to be more extensive than the facts stated in the record.³

§154. Purchaser May Rely on the Title as it Appears of Record.

The policy of the registry law is that the title and all that affects it should be disclosed by the public records, and upon the theory that it is thus shown, the rule obtains that a pur-

¹ Notice of a recorded instrument is notice of all legal incidents pertaining to it. *N. Y. Life Ins. Co. v. Covert*, 6 Abb. N. S. 154. And it will not avail a subsequent purchaser that a recorded mortgage appeared to be barred by limitation, where, in fact, though not shown by the record, it had been extended by virtue of a new promise extending the debt. *Plant v. Shryock*, 62 Miss. 821.

² Lord Chancellor Northington, in *Stanhope v. Varney*, 2 Eden, 81.

³ *Gale v. Morris*, 29 N. J. Eq. 222; *Brownback v. Ozias*, 117 Pa. St. 87, 93; s. c. 11 Atl. Repr. 30; 9 Cent. Repr. 554.

chaser may rely upon the title as it appears of record, and that he will be protected against unrecorded conveyances, outstanding equities, secret liens and conditions of which he has no notice.¹ This proposition embodies the general result of benefit and protection afforded by the recording acts. The rule that a perfect record title affords protection does not obtain where the purchaser is chargeable with actual notice.² Nor does it obtain when the apparent title of record consists in part of a void deed, for such an instrument being a nullity can acquire no effect by registration, and its record charges no one with notice.³ The rule, how-

¹ *Quick v. Milligan*, 108 Ind. 419; s. c. 58 Am. Rep. 49; *Williamson v. Jackson*, 107 U. S. 478; *Testart v. Belot*, 31 La. Ann. 795; *Hathorn v. Maynard*, 65 Ga. 168; *The Conn. Ins. Co. v. Talbot*, 113 Ind. 373; s. c. 3 Am. St. Rep. 655; *Harrington v. Erie Co. Bank*, 101 N. Y. 257; *Newton v. McLain*, 41 Barb. 285; *Cogan v. Cook*, 22 Minn. 137; *Ramsey v. Jones*, 41 O. St. 685; *Pancake v. Cauffman*, 114 Pa. St. 113; s. c. 7 Atl. Repr. 67; *Bailey v. Myrick*, 50 Me. 171; *Columbia Bank v. Jacobs*, 10 Mich. 495; *Hart v. Farmer's Bank*, 33 Vt. 252; *Farmer's Bank v. Wallace*, 45 O. St. 152; s. c. 12 N. E. Repr. 439; *Hoyt v. Jones*, 31 Wis. 389; *Newhall v. Burt*, 7 Pick. 157; *Ashbrooks v. Roberts*, 82 Ky. 298; *Hulett v. Mut. Ins. Co.*, 114 Pa. St. 142; s. c. 6 Atl. Repr. 554; *Kearnes v. Hill*, 21 Fla. 185; *Wright v. Lassiter*, 71 Tex. 640; *Roll v. Rea*, 50 N. J. L. 266; s. c. 12 Atl. Repr. 905; 11 Cent. Repr. 362; *Doherty v. Stimmel*, 40 O. St. 294.

² *Ante*, §12; *post*, §§165, 215-222, where the subject of actual notice is treated at length.

³ *Stone v. French*, 37 Kan. 145; s. c. 1 Am. St. Rep. 237; 14 Pac. Repr. 530; *Pry v. Pry*, 109 Ill. 466; *Chipman v. Tucker*, 38 Wis. 43; s. c. 20 Am. Rep. 1; *Van Amridge v. Morton*, 4 Whart. 382; s. c. 34 Am. Dec. 517; *Harkreader v. Clayton*, 56 Miss. 383; s. c. 31 Am. Rep. 369; *Smith v. South Royalton Bk.*, 32 Vt. 341; s. c. 76 Am. Dec. 179; *Teft v. Munson*, 57 N. Y. 97; *Pearson v. Powell*, 100 N. C. 86.

Such record may be void and ineffectual, because the deed was never delivered. *Woodbury v. Fisher*, 20 Ind. 387; s. c. 83 Am. Dec. 325; *Steffian v. Bank*, 69 Tex. 513, 518; s. c. 6 S. W. Repr. 823; *Stone v. French*, *supra*; *ante*, §144; or because it was executed by a person of unsound mind. *Valentine v. Lunt*, 51 Hun. (58 N. Y. Sup. Ct.), 544. But where the deed is delivered as an escrow, and fraudulently obtained by the grantee, an innocent purchaser is protected. *Quick v. Milligan*, *supra*; *Bailey v. Crim*, 9 Biss. 95.

So the record may be ineffectual because the deed is a forgery. *Pry v. Pry*, *supra*; *McGinn v. Tobey*, 62 Mich. 252; s. c. 4 Am. St. Rep. 848; 28 N. W. Repr. 818; *U. S. v. Samperyac*, Hemp. 118; or, by statute, on account of usury, *Johnson v. Wheelock*, 63 Ga. 623; or because made under a power of sale in a mortgage after the debt had been paid.

ever, protects a subsequent purchaser without notice, buying from one who purchased with notice, and whose deed is recorded.¹ In such case the latter purchaser is charged neither by the record, nor by any matter of fact affecting his conscience and rendering his action inequitable.² The

Shippen v. Whittier, 117 Ill. 282; s. c. 7 N. E. Repr. 642; and where the record is thus from any cause void, it will not impart notice of any equities, which by reason of facts *aliunde* the record, the grantee may have under it. *Loomis v. Bush*, 36 Mich. 40.

Where, through a mistake of name, land was patented to the wrong person, and the patentee sold the land to one having no notice of the mistake, the purchaser was protected against the claim of the person rightfully entitled to the patent. *Lea v. Polk Co. Copper Co.*, 21 How. (62 U. S.), 493; *Robbins v. Moore* (Ill.), 21 N. E. Repr. 934. A deed of trust by a married woman, her husband not joining therein, to secure purchase money due on the premises, though void as a conveyance, has nevertheless been held such an instrument relating to real estate as, when recorded, is constructive notice of the lien of the vendor. *Morri-son v. Brown*, 83 Ill. 562.

¹ *Holmes v. Buckner*, 67 Tex. 107, 112; s. c. 2 S. W. Repr. 452; *Syd- nor v. Roberts*, 13 Tex. 593; s. c. 65 Am. Dec. 84; *Schuchman v. Home- stead*, 111 Pa. St. 48; s. c. 1 Cent. Repr. 913; *Branch v. Griffin*, 99 N. C. 173; s. c. 5 S. E. Repr. 393, 398; *Lee v. Cato*, 27 Ga. 637; s. c. 73 Am. Dec. 476; *East v. Pugh*, 71 Iowa, 162; s. c. 32 N. W. Repr. 309; *Paris v. Lewis*, 85 Ill. 597; *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772; *Demarest v. Wyncoop*, 3 Johns. Ch., 129; s. c. 8 Am. Dec. 427; *Wood v. Chapin*, 13 N. Y. 509; s. c. 67 Am. Dec. 52; *Howard v. Selman*, 77 Ga. 604; *Lane v. Schlemmer*, 114 Ind. 296; s. c. 5 Am. St. Rep. 621; 15 N. E. Repr. 454.

In Louisiana a mortgage of realty includes the crops grown thereon. *Williamson v. Richardson*, 31 La. Ann. 685. So, "all things which the owner of a tract of land has placed upon it for its service and improvement, such as working animals, implements of husbandry, machinery and other appurtenances, are immovable by destination, and are covered by a pre-existing mortgage which attaches to the realty." But where the owner removes such property from the mortgaged premises, one purchasing it from him in good faith takes it clear of the mortgage. *Weil v. Lapeyre*, 38 La. Ann. 303.

The rule applies as to personal property and protects a *bona fide* purchaser from a fraudulent vendee. *Fawcett v. Osborn*, 32 Ill. 411; s. c. 83 Am. Dec. 278; *Moody v. Black*, 117 Mass. 23; s. c. 19 Am. Rep. 394; *Le Grand v. Eufala Bank*, 81 Ala. 123; s. c. 60 Am. Rep. 140; 1 South. Repr. 460; *Saltus v. Everett*, 20 Wend. 267; s. c. 32 Am. Dec. 541; and has been held even to protect a purchaser who takes goods for a pre-existing debt. *Butters v. Haughwout*, 42 Ill. 18; s. c. 89 Am. Dec. 401. See *Collins v. Cook*, 40 Tex. 238; *post*, §207.

² *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772; 2 Pom. Eq. Jur., §754; *Westbrook v. Gleason*, 79 N. Y. 23; *Paris v. Lewis*, 85 Ill. 597; *Price v. Martin*, 46 Miss. 489; *Glidden v. Hunt*, 24 Pick. 221; *Lamb*

only ground upon which his rights can be subordinated to those under the prior unregistered conveyance is where he has not paid a valuable consideration within the meaning of the general doctrine on that subject.¹ The rule also protects a subsequent purchaser against a mistake by which a larger amount of land was conveyed in the deed to his vendor than was intended.²

§155. Purchaser Without Notice May Convey Title to One With Notice.

A purchaser for valuable consideration without notice may convey a perfect and unimpeachable title to one who has notice of an outstanding title or equity.³ The grantor in such case being entitled to protection, his grantee will be accorded the same protection; and this although such grantee be not a purchaser for value, and although the prior adverse conveyance be recorded before he purchases.⁴ The grantor having purchased without notice, the law has declared the prior conveyance, unregistered at the time he bought, absolutely void as to him, and, therefore, it can be

v. Davis, 74 Iowa, 719; s. c. 39 N. W. Repr. 114; Knox v. Silliway, 10 Me. 201, 221; Varick v. Briggs, 6 Paige, 323; Hardin v. Harrington, 11 Bush, 367; Mallory v. Stodder, 6 Ala. 801; Trulock v. Peebles, 3 Kelly (Ga.), 446; Tompkins v. Powell, 6 Leigh, 576; Wood v. Mann, 1 Sumn. 503; Webster v. Van Steenburg, 46 Barb. 211.

¹ See *post*, ch. 8, §§204-208; Wade on Notice, §226; Gardner v. Earley, 72 Iowa, 518; s. c. 34 N. W. Repr. 311; Aubuchan v. Bender, 44 Mo. 560; Setter v. Alvey, 15 Kan. 157; Martin v. Sale, 1 Bail. Eq. 1; Barnard v. Campbell, 58 N. Y. 73; s. c. 17 Am. Rep. 208.

² Garrison v. Crowell, 67 Tex. 626; s. c. 4 S. W. Repr. 69.

³ Moore v. Curry, 36 Tex. 668; Fargason v. Edrington, 49 Ark. 207, 216; s. c. 4 S. W. Repr. 763; Cogswell v. Griffith, 23 Neb. 334; s. c. 36 N. W. Repr. 538; Douglass v. McCracken, 52 Ga. 596; Pierce v. Faunce, 47 Me. 507; Roll v. Rea, 50 N. J. L. 264; s. c. 12 Atl. Repr. 905; 11 Cent. Repr. 362; Blight v. Banks, 6 Mon. 192; s. c. 17 Am. Dec. 136; Pringle v. Dunn, 37 Wis. 449; s. c. 19 Am. Rep. 772; Bean v. Smith, 2 Mason, 252; Bell v. Twilight, 18 N. H. 159; s. c. 45 Am. Dec. 367; Shotwell v. Harrison, 22 Mich. 410; Mills v. Smith, 8 Wall. 27; Funkhouser v. Lay, 78 Mo. 458.

⁴ Wood v. Chapin, 13 N. Y. 509; s. c. 67 Am. Dec. 52; Fallass v. Pierce, 30 Wis. 442; Crane v. Turner, 7 Hun. 357; Webster v. Van Steenburg, 46 Barb. 211; Boynton v. Rees, 8 Pick. 329; s. c. 19 Am. Dec. 326.

given no effect whatever against his rights.¹ The value of the property in his hands would be greatly depreciated if the subsequent record of the prior conveyance, or actual notice of it, could deprive him of the power to sell and convey his perfect title to third persons.² The second purchaser, with notice, takes the title of his grantor unincumbered for the reason that without this, the law does not accord the full measure of protection of which it gives assurance.³ The *jus disponendi* would otherwise be clogged by a restraint of indefinite duration.⁴ There is, however, one well recognized exception to the rule stated in this section. That exception is that the title cannot be conveyed free from the prior equities, back to a former owner who was charged with notice at the time his interest attached.⁵ He cannot clear off the equities by transferring the title to an innocent party, and then re-purchasing it.⁶ In such case, all the equities revive and attach to the property in his

¹ Coster's Executors v. Bank of Ga., 24 Ala. 37; Mott v. Clark, 9 Barr, 399; Boynton v. Rees, 8 Pick. 329.

² Wade on Notice, §62, citing, Lowther v. Carlton, 2 Atk. 242.

³ Cook v. Travis, 20 N. Y. 400; Jackson v. McChesney, 7 Cow. 360; Losey v. Simpson, 11 N. J. Eq. 246; Allison v. Hagan, 12 Nev. 38; Bush v. Lathrap, 22 N. Y. 539, 549; Meshirley v. Burt, 44 Ind. 382; Trull v. Bigelow, 16 Mass. 406; Jackson v. Given, 8 Johns. 137; City Council v. Page, Speer's Eq. 159; Vattier v. Hinde, 7 Pet. 252; Bracken v. Miller, 4 Watts & S. 102; Lindsey v. Rankin, 4 Bibb. 282; Bumpus v. Platner, 1 Johns. Ch. 213; Halstead v. Bank of Ky., 4 J. J. Marsh. 554; Blight v. Banks, 6 Mon. 192; Fletcher v. Beck, 6 Cranch, 36; Boone v. Chiles, 10 Pet. 177; Kirby v. Miller, 1 Casey, 264; Holmes v. Stout, 3 Green Ch. 492; Curtis v. Lunn, 6 Munf. 42.

⁴ The rule stated in this section will not be applied under all circumstances. Thus where the first purchaser, although without notice, was a mere volunteer, and therefore held subject to equities, a purchaser from him with notice also took subject to the same equities. Johns v. Sewell, 33 Ind. 1. A tenant in common, with notice, cannot get a clear title from his co-tenant without notice by partition. Blatchley v. Osborne, 33 Conn. 226.

⁵ Simpson v. Montgomery, 25 Ark. 365; s. c. 99 Am. Dec. 228; Trentman v. Eldridge, 98 Ind. 525; Ashton's Appeal, 73 Pa. St. 153; Oliver v. Piatt, 3 How. 401; Church v. Church, 1 Casey, 278; Church v. Rudland, 64 Pa. St. 432; Bumpus v. Platner, 1 Johns. Ch. 213; Troy City Bank v. Wilcox, 20 Wis. 671.

⁶ Schutt v. Large, 6 Barb. 373.

hands.¹ The principle has also been applied where an agent who had been guilty of bad faith in the first sale, subsequently purchased the property for himself.²

§156. When Full Record Title Does Not Protect Purchaser in Good Faith.

The rule stated in the preceding section applies only where the first purchaser is a purchaser without notice. If he buys with notice, or without valuable consideration, his conveyance to another who also has notice, will be subject to the rights and equities that attach against the property in his hands.³ And although such later vendee be without actual notice, yet if the prior outstanding conveyance is recorded before he purchases, he is thereby charged with constructive notice.⁴ He is not, in this instance, entitled to protection for his grantor's sake, nor can he claim it on his own account, because the prior deed of the adverse party is on record when he buys. The prior first conveyance, not being void as against a subsequent conveyance with notice, or without valuable consideration, can claim the right and effect of record at any time before the property is conveyed to a

¹ 2 Pom. Eq. Jur., §754; *Trentman v. Eldridge*, 98 Ind.*525; *Kennedy v. Daly*, 1 Sch. & Lef. 355.

² A deed and a mortgage of the same property were executed on the same day to different parties, neither referring to the other. The agent of the mortgagor, through bad faith or negligence, failed to record the mortgage until after the deed was recorded, and it was held that a subsequent purchase of the property by him from the grantee in the deed was subject to the rights of the mortgagee. *Mitchell v. Aten*, 37 Kan. 33; s. c. 1 Am. St. Rep. 231; 14 Pac. Repr. 530.

³ This is but the operation of the general principle of the equitable doctrine of notice. *Ante*, §12; *post*, ch. ix; 2 Pom. Eq. Jur., §§759, 659-666. It applies where a purchaser is affected with knowledge of fraud, as well as of a prior conveyance. See cases cited *ante*, §89.

⁴ *Mahoney v. Middleton*, 41 Cal. 41; *Warden v. Williams*, 24 Ill. 67; *Van Rensselaer v. Clark*, 17 Wend. 25; *Jackson v. Post*, 15 Wend. 588; *Sims v. Hammond*, 33 Iowa, 368; *Cabeen v. Breckinridge*, 48 Ill. 91, 95; *Morrison v. Kelley*, 22 Ill. 610; s. c. 74 Am. Dec. 169; *English v. Waples*, 13 Iowa, 57; *Fallass v. Pierce*, 30 Wis. 442; *Flynt v. Arnold*, 2 Metc. 619; *Schutt v. Large*, 6 Barb. 373; *Ring v. Steele*, 3 Keyes, 450; *Goelet v. McManus*, 1 Hun. 306; 1 Jones on Mort., §§574, 575; 2 Pom. Eq. Jur., §760.

purchaser without notice.¹ Thus, if A. conveys to B., and afterwards to C., who places his deed first on record, but who has bought with actual notice, the subsequent record of B.'s deed will charge constructive notice, and any purchaser from C. will take subject to B.'s rights. The deed to B. being of record at the time he buys, he must take notice of it; and when he has done so, he is put upon inquiry as to the facts of the matter, and the true state of the title as between the conflicting claimants.² But if C., before the record of B.'s deed, conveys to D. who is without notice, then D. having neither actual nor constructive notice of B.'s rights at the time he buys, receives an indefeasible title, and can convey such title to E. after the record of B.'s deed, and although E. may have actual notice of it.³

¹ Thus, if A. makes a second deed of the same property to C., who takes with knowledge of the prior deed to B., and C. then conveys to D., who has like knowledge, and D. to E., and so on to the end of the alphabet, each subsequent grantee having knowledge of B.'s prior right, and all their conveyances being recorded, yet then if B. should record his deed before the last grantee with knowledge, and Z. should make conveyance, the purchaser from Z. would be bound to take notice of B.'s rights, and of the relations existing between them, and all the subsequent purchasers from C. to Z. inclusive. *Fallass v. Pierce*, 30 Wis. 443. But as soon as any one in the above chain of title purchases in good faith and for valuable consideration, the title under the unrecorded deed to B. is effectually cut off, except that, in those states where title is made to depend on priority of record, B.'s title would still prevail if placed on record before that of such last purchaser. *Ante*, §§13-15; *post*, §§166-168.

² *Fallass v. Pierce*, and cases above. *Contra*, it has been held that the record of the prior deed after the second, is notice to a purchaser from the vendee in the second deed that there is such a deed, but not that the vendee therein, at the time he secured it, had notice of the first deed, and without such notice the title of the purchaser from the vendee in the second, but first recorded, deed would not be affected by the fraud or knowledge of his vendor. *Day v. Clark*, 25 Vt. 397, 402, cited fully in *Wade on Notice*, §200.

³ *Flynt v. Arnold*, *supra*. This proposition is, of course, subject to the requirement contained in some of the statutes, that the subsequent purchaser without notice must prove the winner in the race for registry, and get his deed first of record. *Fallass v. Pierce*, *supra*. In this last case, which was very fully argued and re-argued before the court, and in which there are two conflicting opinions, the facts were these: P. mortgaged lands to B., and the mortgage was recorded. B. assigned

§157. Continued—The Contrary View under which such Purchaser is Protected.

The rule stated in the preceding section presents, under one set of circumstances, the unusual feature of a purchaser failing of protection, although he buys in good faith, for valuable consideration, and under a full chain of recorded title. Although the rule is supported by the greater weight of authority, and it is believed also by the better reason, it does not obtain universally. It countervenes the rule, prevailing to some extent, that a purchaser examining the record of title is not expected to look beyond a good conveyance to his grantor; or that the searcher, in tracing the record title down, may stop with the first recorded conveyance out of a given owner, and need not pursue that name further, nor look for conveyances from two person during the same period.¹ This latter rule obtains in Massachusetts, both by the earlier and later cases in that state,² though shaken for a time by the case of *Flynt v. Arnold*.³

the mortgage to R., and the assignment was not recorded. B. then released the land by deed to P., who knew of the assignment to R. This deed of release was recorded, and thereupon P. conveyed to X., a purchaser in good faith for value, who neglected to record his deed from P. until after the assignment to R. was recorded. It was held that the deed to X., if recorded before the assignment of the mortgage, would have prevailed; but that under the statute of Wisconsin, giving preference to a subsequent conveyance if first recorded, it could not, in the absence of such priority of record, cut off the mortgage. The ultimate decision of the case is rested entirely on the arbitrary effect of the statute as to priority of record; the better reasoning of the matter being in the contrary opinion first rendered by Justice Cole. In support of the decision, C. J. Gibson cites *Jackson v. Town*, 4 Cow. 405; *Ledyard v. Butler*, 9 Paige, 132; *Purdy v. Huntington*, 46 Barb. 398; *Jackson v. Campbell*, 19 Johns. 283; *Hawley v. Bennett*, 5 Paige, 111; *Den v. Richman*, 1 Green (N. J.), 43.

¹ *Ely v. Wilcox*, 20 Wis. 523; s. c. 91 Am. Dec. 436; *Connecticut v. Bradish*, 14 Mass. 296; *Trull v. Bigelow*, 16 Mass. 406; *Glidden v. Hunt*, 24 Pick. 221.

² The earlier cases are stated in the note above. The later case, in which the decision, rendered by C. J. Morton, affirms and adheres to the rule laid down in these cases, is *Morse v. Curtis*, 140 Mass. 112; s. c. 54 Am. Rep. 456; 2 N. E. Repr. 929.

³ 2 Met. 619. In Vermont, as in Massachusetts, the court reaches the conclusion that the subsequent record of the prior deed is ineffectual, but upon a different ground. See *Day v. Clark*, 25 Vt. 397, cited in note

Hence, in that state the subsequent record of the prior conveyance does not, under the circumstances stated, charge a subsequent purchaser with constructive notice. A matter of mere convenience in searching the records is entitled to but slight consideration; but in these instances where the rights of conflicting claimants are so nearly balanced both in law and equity, even slight matters may not unreasonably be held sufficient to turn the scale in deciding which one of the parties shall be "shipwrecked in the event." It is more in consonance, however, with the policy and broader spirit of the registry law that a subsequent purchaser should be chargeable by the record with notice of every conveyance emanating from any party through or under whom the purchaser claims, and registered at the time his rights accrue.¹

§158. Break in the Record Title.

Founded in part on this matter of convenience in searching the records, and in part on somewhat broader grounds, is a generally recognized rule that where there is a break in the recorded title, the registry of a conveyance from a subsequent owner whose deed, or full chain of title, is not on record, does not charge constructive notice. Thus, where A. conveys to B., who neglects to record his deed but conveys to C., the record of the deed from B. to C. will not charge with notice a subsequent purchaser from A.² Where 2, page 247, *ante*. And see, also, the case of Hollingsworth v. Wilson, 32 La. Ann. 1012.

¹ In New York, where the general rule prevails as stated in the preceding section, it has been held that where a deed was made to a son and recorded, the son knowing it to have been made with intent to defraud creditors, the record of a sheriff's deed subsequently made under process against the grantor, did not charge subsequent grantees in good faith from and under the son with any sort of constructive notice. *Hooker v. Pierce*, 2 Hill, 650.

² *Watson v. Chalk*, 11 Tex. 93; *Bingham v. Kirtland*, 34 N. J. Eq. 229; *Ely v. Wilcox*, 20 Wis. 523; s. c. 91 Am. Dec. 436; *Thompson v. Westbrook*, 56 Tex. 265; *Chicago v. Witt*, 75 Ill. 211; *Cook v. Travis*, 22 Barb. 338; *Losey v. Simpson*, 11 N. J. Eq. (3 Stockt.), 246; *Page v. Waring*, 76 N. Y. 463; *Calder v. Chapman*, 52 Pa. St. 359; *Fenno v. Sayre*,

there is such a break in the chain of recorded title, the records, it is said, will not enable the purchaser to supply the missing links, and to connect the broken parts by any systematic search. It has even been declared that this rule is essential to any just working of the registry system.¹ This, however, is manifestly giving an undue importance to this matter of convenience and the sequence of names in the index for searchers. When it is considered that the matter of indexing is usually held to be only directory, so that an entire failure to index the record of a conveyance will not prevent it from being notice;² and that these gaps occur more or less frequently in the record of every title by reason of death and descent cast;³ and that this sequence of names is

3 Ala. 458; *Lightner v. Mooney*, 10 Watts, 407; *Roberts v. Bourne*, 23 Me. 165; s. c. 39 Am. Dec. 614; *Bazemore v. Davis*, 55 Ga. 504; *DeYampert v. Brown*, 28 Ark. 166; *Butts v. Norcross*, 14 Pick. 224; *Holmes v. Buckner*, 67 Tex. 107; s. c. 2 S. W. Rep. 452; *Doolittle v. Cook*, 75 Ill. 354.

Where both of the conflicting deeds from the original common grantor are unrecorded, it is of no avail that an intermediate deed to one of the claimants is recorded within its statutory period of one year. *Thursby v. Myers*, 57 Ga. 155, 158.

¹ See 2 Pom. Eq. Jur., §761; *Felton v. Pitman*, 14 Ga. 536; *St. John v. Conger*, 40 Ill. 537.

² Where, as by statutes of many of the states, the full effect of notice is given to the filing for record, no index whatever is requisite to the legal sufficiency of the notice. *Ante*, §142.

The record of a deed, by the wife alone, of community property, the title to which is recorded in the name of the husband alone, will, if the circumstances authorize her to make the deed, charge with constructive notice a subsequent purchaser from the husband. *Zimpleman v. Robb*, 53 Tex. 274. The wife's deed, indexed in the husband's name, held sufficient. *Jones v. Berkshire*, 15 Iowa, 248; s. c. 83 Am. Dec. 412.

³ A purchaser from an heir will be protected against an unrecorded deed from the ancestor, despite the gap in the record between the heir and the ancestor. *Voorhis v. Westervelt*, 43 N. J. Eq. 642; s. c. 3 Am. St. Rep. 315; *McCulloch v. Endaly*, 3 Yerg. 346; *Rupert v. Mark*, 15 Ill. 540; *Powers v. McFerran*, 2 Serg. & R. 44; *Ellis v. Smith*, 10 Ga. 253; *Zimpleman v. Robb*, 53 Tex. 274.

Possession, even by a tenant, and though it be unknown to a subsequent purchaser, is held sufficient to put him on inquiry and to constructively charge him with notice of an unrecorded deed, or any other equity of the claimant. See *post*, ch. x. It would seem, by parity of reasoning, that the record of a deed, though disconnected from its chain of title, would be held sufficient to put a subsequent purchaser upon in-

often broken by the marriage of *femes sole* and by reason of judicial and execution sales that are not uncommonly indexed in the name of the officer alone as grantor; and that for every recording office there are usually numerous abstract offices from which, at but moderate expense, if any, to the purchaser, the recorded history of every tract or parcel of real estate can be obtained—it will appear that this is but a slight ground, indeed, upon which to found a rule that largely restricts the effect of a public record that is intended, and in many instances expressly declared by statute, to be “notice to all the world.”¹ The better reason of the matter is stated by Chief Justice Gibson in the remark that “every consideration of the matter and construction of the statute founded in the convenience or inconvenience, real or supposed, of searching the records in the manner

quiry as to the unrecorded deed that constitutes the missing link. See *Clark v. Holland*, 72 Iowa, 34; s. c. 33 N. W. Repr. 350.

¹ *Ante*, §§21, 22. The rule stated in the text does not prevail in Louisiana, where registry imparts notice notwithstanding a break in the record. Thus A. sold to B. in 1845, and then to C. in 1850. The deed from A. to B. was recorded in 1854; that from A. to C. in 1850; but a deed from B. to D. was recorded in 1848, and the claimants under B.’s title prevailed. *Hollingsworth v. Wilson*, 32 La. Ann. 1012. “Their title,” said Mr. Justice Fenner, in this case, “cannot be affected by the non-registry of an anterior conveyance. The question is not an open one. It has been settled by five decisions of this court. *Buchanan v. Morgan*, 7 La. Ann. 249; *Poydras v. Laurans*, 6 *Id.* 771; *Cotton v. Stacker*, 5 *Id.* 677; *McGill v. McGill*, 4 *Id.* 262, 267; *Stockton v. Briscoe*, 1 *Id.* 249.”

In the case last named, Eustis, C. J., delivering the opinion, said: “The plaintiff might, or not, have taken advantage of the non-recording when the property belonged to the party who may be considered in default in not recording his title; but to permit him to disturb a *bona fide* purchaser who holds under a recorded title, would be pushing the registry laws beyond their policy and intendment. The object of these laws is to make apparent the ownership of property, and whenever the ownership appears on the records by proper titles, that object is attained; notice is thereby given, and no person can be deceived as to who is the owner. There is neither reason nor sound policy in the contrary interpretation. We determine this case on this point alone.” The dissenting opinion in this case by Mr. Justice Slidell is a very strong presentation of the reasoning in favor of the prevailing rule, citing in its support the case of *Knox v. Silloway*, 1 Fairf. 201.

in which they are kept or indexed, is wholly impertinent, and, therefore, deceptive and liable to lead to error.”¹

§159. Continued—Actual Notice as Supplying the Gap.

The rule just stated rests in part also upon the further consideration that where there is a break in the record title, it does not necessarily appear that a subsequent deed has any connection with the title under examination; it may, for aught that is disclosed by it, emanate from a stranger, and pertain to a different claim or source of title. Where, however, enough is brought to the knowledge of the subsequent purchaser to put him on inquiry as to the missing link, or the connection of title, the record of the subsequent deed is effectual.² The actual reading of the record of a subsequent deed containing recitals that refer to the unrecorded conveyance, will suffice to put on notice,³ but the mere registry of a subsequent deed with such recitals therein has usually been held not sufficient to charge constructive notice.⁴ For the reason, perhaps, that this rule in

¹ Fallass v. Pierce, 30 Wis. 442.

² Chicago v. Witt, 75 Ill. 211; Clark v. Holland, 72 Iowa, 34; s. c. 33 N. W. Repr. 350; Crane v. Turner, 67 N. Y. (7 Hun.), 437; Doolittle v. Cook, 75 Ill. 354.

³ See cases above, and Mills v. Smith, 4 Biss. 442; Musgrove v. Bosner, 5 Or. 313; s. c. 20 Am. Rep. 737; Musick v. Barney, 49 Mo. 458; Hastings v. Cutler, 24 N. H. (4 Fost.), 483; Walter v. Hartwig, 106 Ind. 123; s. c. 3 West. Repr. 881; 6 N. E. Repr. 5; Gilbert v. Jess, 31 Wis. 110. *Contra*, Kerns v. Swope, 2 Watts. 75.

⁴ Word v. Box, 66 Tex. 596; Wade on Notice, §210, citing Losey v. Simpson, 11 N. J. Eq. (3 Stockt. Ch.), 246; Keller v. Nutz, 5 Serg. & R. 246; Maul v. Rider, 59 Pa. St. 167; Long v. Dollarhide, 24 Cal. 218; Fenno v. Sayre, 3 Ala. 458; Tilton v. Hunter, 24 Me. 29; Ely v. Wilcox, 20 Wis. 530; s. c. 91 Am. Dec. 436.

E. T. W. conveyed land to his wife Evaline W., but the deed was not recorded until after the land had been bought at sheriff's sale, under execution against E. T. W. by R., who had actual notice, and had also been conveyed by R. to B., who was without actual notice of the outstanding deed. Mrs. E. W. having died, G., one of her children, conveyed to H., the deed reciting that the part conveyed was inherited by G. from Mrs. E. W., wife of E. T. W., who inherited the land from his father; and this deed was recorded prior to the purchase by B. *Held*, that it showed on its face no connection with any other conveyance leading up to the common source, and its registry was not constructive

reference to a break in the recorded title rests upon a somewhat narrow ground, its application in this last particular has not been uniform.¹

§160. Record of Mortgage Before Deed to Mortgagor.

For the reason also of a want of connection in the recorded chain of title, the record of a mortgage before that of a deed conveying the premises to the mortgagor, is usually held not to impart notice. Thus, if one conveys land by deed, and the grantee makes a mortgage back to secure the purchase money, the deed being unrecorded, the record of the mortgage is not notice of the existence of the deed.² So, after the record of the deed, a subsequent purchaser from the grantee therein, it has been held, is not chargeable with notice of the prior recorded mortgage for the reason that he would not be bound to search for incumbrances by his vendor prior to the time such vendor acquired the title as shown by the record.³ If, however, a subsequent purchaser has actual notice of a mortgageable

notice to B.; and that one actually reading the recital, would naturally conclude that the title in Mrs. W. was claimed by reason of her being the wife of E. T. W., and not that her husband had conveyed the property to her. *Holmes v. Buckner*, 67 Tex. 107; s. c. 2 S. W. Repr. 452.

¹ See *Digman v. McCollum*, 47 Mo. 372, 376; *Hamilton v. Boggess*, 63 Mo. 233; *Wade on Notice*, §211. Possession is such actual notice as will supply a break in the record. *Glendenning v. Bell*, 70 Tex. 632; s. c. 8 S. W. Repr. 324.

² *Bingham v. Kirtland*, 34 N. J. Eq. 229; *Boyd v. Mundorf*, 30 N. J. Eq. (3 Stew.), 540; *Davis v. Lutkieweis*, 72 Iowa, 254; s. c. 33 N. W. Repr. 670; *Dusenbury v. Hurlburt*, 59 N. Y. 541; *Veazie v. Parker*, 23 Me. 170; *Pierce v. Taylor*, *Id.* 246.

A mortgage for the purchase money, recorded with the deed of purchase, has priority of a mortgage executed by the purchaser before he concluded the purchase, to secure a loan with which to make the cash payment, though this mortgage be recorded before the mortgage to the vendor. *Turk v. Funk*, 68 Mo. 18; s. c. 30 Am. Rep. 771; *City Nat. Bank's Appeal*, 91 Pa. St. 163; 1 *Jones on Mort.*, §466; *post*, §172. *

³ *Farmer's Loan Co. v. Maltby*, 8 Paige, 361; *Calder v. Chapman*, 52 Pa. St. 369; *Fairecloth v. Jordan*, 18 Ga. 350; *Wing v. McDowell*, Walk. (Mich.), 175; *Page v. Waring*, 76 N. Y. 463, 468; *Buckingham v. Hanna*, 2 O. St. 551; *Doswell v. Buchanan*, 3 Leigh, 365; s. c. 23 Am. Dec. 280; *Code of Va.* (1887), §2473; *Hetzel v. Barber*, 69 N. Y. 1; *Losey v. Simpson*, 11 N. J. Eq. 246.

estate in one whose title is not of record, he will be bound to search for incumbrances against that title.¹

§161. Continued—Exception Created by Estoppel.

The application of the doctrine of estoppel in connection with recording presents an exception to the rule stated in the preceding section. Under the law of estoppel a conveyance, whether by deed or mortgage, with covenants of warranty, and in some of the states without such covenants,² carries an after-acquired title.³ As soon as the grantor in such conveyance acquires the title, it vests at once in his grantee by virtue of the estoppel, and where he has made more than one conveyance of the premises, it enures to the benefit of the grantee in the first conveyance made by him.⁴ When, therefore, he has mortgaged the

¹ The notice may arise from possession under a parol contract of purchase, or from actual knowledge of a recital in the deed that the grantor had been in possession for several months prior to the deed, under such contract of purchase. *Crane v. Turner*, 67 N. Y. (7 Hun.), 437. So where a mortgage back to the grantor has been given and placed of record, the deed of purchase, however, not being recorded, if this record is actually known to a subsequent purchaser from such grantor, this is sufficient to put him on inquiry, and to suggest that such grantor has already parted with the title. *Clark v. Holland*, 72 Iowa, 34; s. c. 33 N. W. Repr. 350. And see cases in last note to §159, *ante*.

A mortgage dated and acknowledged Sept. 17, 1880, and recorded Oct. 15, 1880, held constructive notice to subsequent purchasers, although the mortgagor's deed to the premises was in fact (and this also appeared from the county records) dated Sept. 30, 1880, and was recorded Nov. 24, 1880. *Semon v. Terhune*, 40 N. J. Eq. 364; s. c. 2 Atl. Repr. 18; and this said by the court not to be in conflict with *Losey v. Simpson*, 3 Stockt. (11 N. J. Eq.), 246, and *Spielman v. Kliet*, 9 Stew. (36 N. J. Eq.), 199.

² *Gibson v. Chouteau*, 39 Mo. 536; *Frink v. Dowdall*, 14 Ill. 304; *Cocke v. Brogan*, 5 Ark. 693; *Vallejo v. Viele*, 48 Cal. 572.

³ *Bigelow on Est.*, 285, *et seq.*; *Merritt v. Harris*, 102 Mass. 326; *Humphreys v. Newman*, 51 Me. 40; *Wark v. Willard*, 13 N. H. 389; *Brown v. McCormick*, 6 Watts, 60; *White v. Patten*, 24 Pick. 324; *Goodell v. Burnett*, 22 Wis. 565.

⁴ *Jarvis v. Aikens*, 25 Vt. 685; *Cole v. Raymond*, 9 Gray, 217; *Farmer's Loan Co. v. Maltby*, 8 Paige, 361; *Potts v. Dowdall*, 3 Houst. 369; *Doyle v. Peerless Co.*, 44 Barb. 239; *McCusker v. McEvey*, 9 R. I. 525; *Kimball v. Blaisdell*, 5 N. H. 533; s. c. 22 Am. Dec. 476; *McCarty v. Mann*, 19 Wall. 20.

The doctrine that an after-acquired title vests in the subsequent grantee, *eo instanti* and by virtue of the estoppel alone, does not univer-

premises before acquiring the title, a purchaser from him after he acquires title, will take subject to the mortgage, and since this imposes on such purchaser the duty of searching for the mortgage, it follows that he is, in effect, charged with constructive notice by its record. Thus, where A., having no title, executed a mortgage to B., which was recorded, and then A., after the record of a deed of the premises to himself, conveyed to C., who was without actual notice of the mortgage, it was held that the record of the mortgage was notice to C., and that under the recording laws B. was entitled to priority.¹ If at the time of the mortgage to B., and up to that of the conveyance to C., the title had been vested in A., defective only in that the deed to himself was not recorded, B. would have been "shipwrecked in the event;" but since his grantor's title, at the date of his mortgage, was wholly defective instead of only partly so, B. prevails. This unreasonable state of the law results from the want of merit in the rule that a purchaser is not bound to look back of the date of the conveyance to his grantor, as it may be shown of record; by reason of which the rule is subordinated to the operation of any other principle, whether of law or equity, that conflicts with it. In the case stated, it was the duty of C. to examine the records for conveyances from A., and prudence would dictate that while engaged in the examination, it would be well for him to make it full. As said by the court of Missouri in a case nearly similar, "if he had searched the records as a prudent man should, he must have

sally obtain, aside from any effect of the registry acts. See Bigelow on Estoppel. *supra*, and cases reviewed by him.

¹ *Teft v. Munson*, 57 N. Y. 97. This well considered case, with dissenting opinion, is cited in *Wade on Notice*, §216; in *Pom. Eq. Jur.*, §658, and quite at-length in 1 *Dev. on Deeds*, §721. In support of its decision, see *Salisbury v. Cutting*, 50 Conn. 113; *Semon v. Terhune*, 40 N. J. Eq., 364, and cases in next notes above and below.

Under 1 Rev. Stats. of N. Y., §137, art. 4, an after-acquired title does not enure to the benefit of a grantee whose deed is unacknowledged and unattested. *Chamberlain v. Spargur*, 86 N. Y. 603

acquired actual knowledge of the deed (mortgage), and its contents as shown by the records. If he neglected this reasonable precautionary search, the consequences of that neglect he must bear. It would be unjust to visit them upon an innocent third party.¹

§162. Record is Notice Only to Purchasers Under Same Grantor.

The record is constructive notice only to those claiming under the grantor in the conveyance, and in the same line of title.² This rule, more than all others, limits the effect of the record as notice to "all the world," yet the limitation in this instance is not a merely artificial and arbitrary one, but arises from the nature and reason of the matter.³ The registry of a deed is for the purpose of giving public

¹ *Digman v. McCollum*, 47 Mo. 372. This was a case wherein a party, before title had vested in himself, and while having only a bond for a deed, assigned the bond, and an assignee of the bond gave a deed of trust of his interest in the premises, which was recorded prior to the record of title to the first assignor, and its record held to charge constructive notice. The case is cited at length in 1 Dev. on Deeds, §723, and note. Since the extension of the registry acts to embrace equitable as well as legal titles, the reason of the rule exempting a purchaser from examining the records, as to his grantor, back of the date of his grantor's deed, no longer exists to the same extent as formerly. See *ante*, §§19, 22.

² *Holmes v. Buckner*, 67 Tex. 107; s. c. 2 S. W. Repr. 452; *Traphagen v. Irwin*, 18 Neb. 195; s. c. 24 N. W. Repr. 684; *Huber v. Bossart*, 70 Iowa, 718; *Kerfoot v. Cronin*, 105 Ill. 609; *Word v. Box*, 66 Tex. 596; *Tarbell v. West*, 86 N. Y. 280; *Satterfield v. Malone*, 35 Fed. Repr. 445; *James v. Brown*, 11 Mich. 25; *Gillett v. Gaffney*, 3 Colo. 351; *Baker v. Griffin*, 50 Miss. 158; *Halstead v. Bank of Ky.*, 4 J. J. Marsh. 558; *Dolin v. Gardner*, 15 Ala. 758; *Corbin v. Sullivan*, 47 Ind. 356; *Hager v. Spect*, 52 Cal. 579; *Odle v. Odle*, 73 Mo. 289; *Straight v. Harris*, 14 Wis. 509.

³ *Ante*, §§21, 22. For other cases supporting the text, see *Wood v. Farmere*, 7 Watts, 282; s. c. 32 Am. Dec. 772; *Crockett v. Maguire*, 10 Mo. 34 (cited fully in *Wade on Notice*, §213); *Wheelwright v. DePeyster*, 4 Edw. Ch. 232; s. c. 3 Am. Dec. 345; *Roberts v. Bourne*, 23 Me. 165; s. c. 39 Am. Dec. 614; *Birnie v. Main*, 29 Ark. 591; *Hill v. McCarter*, 27 N. J. Eq. 41; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; s. c. 59 Am. Dec. 478; *Blake v. Graham*, 6 O. St. 580; s. c. 67 Am. Dec. 360; *Whittington v. Wright*, 9 Ga. 23; *Maul v. Rider*, 59 Pa. St. 167; *Bates v. Norcross*, 14 Pick. 224; *Lightner v. Mooney*, 10 Watts, 407; *Murray v. Ballon*, 1 Johns. Ch. 566; *Jenkins v. Adams*, 71 Tex. 1; *Iglehart v. Crane*, 42 Ill. 261; *Calder v. Chapman*, 52 Pa. St. 359; *Tyler v. Hammond*, 28 Mass. (11 Pick.) 193.

information that the grantor therein has parted with his title to the property; and of protecting subsequent parties against another sale of the property by that person. While the notice is given to all the world, yet in its practical operation it can affect only those who buy, or propose to buy, from or under the one who has made the recorded conveyance. Notice of a sale by one person cannot affect the interests of another who claims the property by a different right emanating from a different source of title. In the case of distinct and conflicting titles to the same property, the superiority between them depends not on their being recorded, nor upon any actual notice by either adversary to the other, but upon their intrinsic merits.¹ A purchaser must examine the title under which he buys, but he is not affected by the record of a conveyance from one stranger to the title to another.² The purchaser who is protected by the record of a conveyance need not be a purchaser directly from the grantor in that instrument; it is sufficient that he is a purchaser in the subsequent line of that title.³

¹ 2 Pom. Eq. Jur., §658; *Windom v. Schappell* (Minn.), 38 N. W. Repr. 757. An exception to the rule stated in this section of the text exists where the title of the grantor is one that has ripened into perfection from adverse possession under the statutes of limitation. *Wade on Notice*, §205, citing *Digman v. McCollum*, 47 Mo. 372; *McCoy v. Trustees, etc.*, 5 Serg. & R. 254; *Hetherington v. Clark*, 30 Pa. St. 393; *Bates v. Norcross*, 14 Pick. 224.

² *Keller v. Nutz*, 5 Serg. & R. 245; *Bates v. Norcross*, *supra*. An unauthorized deed by an executor in one state of lands situated in another, though recorded in such other state, is not notice to purchasers from the heirs of the testator. *Blake v. Graham*, 6 O. St. 580; s. c. 67 Am. Dec. 360.

³ *Fallass v. Pierce*, 30 Wis. 443; *Flynt v. Arnold*, 2 Metc. 619; but see, *contra*, *Raynor v. Wilson*, 6 Hill, 469, cited and criticised in *Fallass v. Pierce*, *supra*. A judgment may constitute a link in the subsequent purchaser's chain of title. *Hoyt v. Jones*, 31 Wis. 389; but not a judgment quieting a tax title. *Windom v. Schappell*, *supra*; s. c. 27 Cent. Law Jour. 304.

The rule that a purchaser is not affected by the record of a deed or contract made by one under whom his title is not derived, is declared by statute in Virginia. Code of Va., 1887, §2473; *Doswell v. Buchanan*, 3 Leigh, 365; s. c. 23 Am. Dec. 280.

§163. Record Does Not Charge Prior Parties.

The effect of recording is not intended to be retrospective in its operation, and hence registration is not notice to prior parties whose conveyances are of record.¹ It cannot act as a notice backwards in point of time so as to change rights already vested and secured by recorded instruments.² The rule, it is said, applies even where the antecedent rights might have been, under the statute, defeated by priority of record.³ The instances that most frequently call for the application of the rule are those of the record of subsequent mortgages.⁴ The record of a deed is

¹ *Birnie v. Main*, 29 Ark. 591; *Boyce v. Stanton*, 15 Lea (83 Tenn.), 346; *O'Neill v. Wabash*, 4 Biss. 482, 484; *Taylor v. Maris*, 5 Rawle, 51; *Ward v. Hague*, 25 N. J. Eq. 397; *Cooper v. Bigly*, 13 Mich. 463; *Wade on Notice*, §203; *Holley v. Hawley*, 39 Vt. 525; s. c. 94 Am. Dec. 350.

² *Doolittle v. Cook*, 75 Ill. 354; *George v. Wood*, 9 Allen, 80; *Deuster v. McCamus*, 14 Wis. 307; *Kyle v. Thompson*, 11 O. St. 616; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; s. c. 59 Am. Dec. 478; *McCabe v. Grey*, 20 Cal. 509.

Even where the deed was pursuant to a contract between the same parties, already of record, its registration does not have the effect to make it relate back and take effect from the time the contract was recorded, so as to cut off all equities that existed between the date of the execution of the contract and that of the deed. *O'Neill v. Wabash*, 4 Biss. 482.

³ 2 Pom. Eq. Jur., §657, in the note to which a leading case on this subject, *Stuyvesant v. Hone*, 1 Sand. Ch. 419; s. c. 2 Barb. Ch. 151, is quoted fully.

⁴ *Vanorden v. Johnson*, 14 N. J. Eq. 376; s. c. 82 Am. Dec. 254. The principle stated in this section is measurably involved in the decisions that the acknowledgment, ratification and delivery of deeds cannot relate back so as to cut off intervening rights. *Parmelee v. Simpson*, 5 Wall. 81; *Coal Creek Co. v. Heck*, 15 Lea (83 Tenn.), 497, 513; *Harrison v. Wade*, 3 Cold. 565; *Hendon v. White*, 52 Ala. 597; *ante*, §119.

Where the certificate of sale, under Gen. Stats. of Colorado, §215, has been recorded, the sheriff's deed relates back to the date of sale and cuts off a deed recorded after the record of the certificate, though older than the judgment. *McMurtrie v. Riddell*, 9 Colo. 497; s. c. 13 Pac. Repr. 181. Without the aid of such statutory certificate, the record of the sheriff's deed does not relate back under such circumstances. *Reynolds v. Darling*, 42 Barb. 418. Compare *Foster v. Dugan*, 8 Ohio, 87; s. c. 31 Am. Dec. 432.

Where there are no specific intervening rights, the delivery of a deed will relate back to a prior recording of it so as to constitute possession under it a holding under a duly recorded deed. *Parker v. Spencer*, 61 Tex. 155.

not constructive notice to parties holding under a prior contract so as to invalidate payments made by them on the contract to such grantor, without actual notice of the rights of the grantee in the deed.¹ But if the holder of a junior mortgage, on record before the institution of a suit to enforce a prior lien, is not made a party to that suit, he is not precluded from asserting his lien as against those who hold under the judgment, although in so doing he must satisfy their interest in the whole of the land, and not in a part only. The title of the purchaser is not, as against a subsequent incumbrance, absolute under such circumstances.²

§164. Continued—Record of Subsequent Mortgage as Notice to Prior Parties.

As the record cannot have a retrospective effect, a prior mortgagee cannot by its operation be charged with the equities of a subsequent mortgagee and is not bound by them, except as above stated, unless he has actual notice, or such notice as should put him on inquiry.³ While the law requires every man to deal with his own so as not to injure another, it imposes a greater obligation on the second mortgagee to take care of his own interests than upon the first to take care of them for him. To make it the duty of the first mortgagee to inquire before he acts, lest he may injure some one, would be to reverse the rule, and make it his duty to do for the second mortgagee what he should do for himself.⁴ Hence the prior mortgagee without actual

¹ Frick's Appeal, 101 Pa. St. 485; Cook v. Dillon, 9 Iowa, 407; Baldwin v. Thompson, 15 *Id.* 504; Wethersbee v. Farrar, 90 N. C. 259.

² Turner v. Phelps, 46 Tex. 251; Byler v. Johnson, 45 Tex. 509; Breedlove v. Ewing, *Id.* 47; Watson v. Spence, 20 Wend. 264; 2 Hilliard on Mort., 87, §35; Freeman on Judgments, §§162, 205; Haines v. Beach, 3 Johns. Ch. 459; 4 Kent's Com. 186; Peto v. Hammond, 29 Beav. 91.

³ Ranney v. Hardy, 43 O. St. 157; s. c. 1 West. Repr. 52; Doolittle v. Cook, 75 Ill. 354; Cogswell v. Stout, 32 N. J. Eq. 240; Howard Ins. Co. v. Halsey, 8 N. Y. 271; s. c. 59 Am. Dec. 478; Heaton v. Prather, 84 Ill. 330; Brown v. Simons, 44 N. H. 475; Meacham v. Steele, 93 Ill. 135; Frick's Appeal, 101 Pa. St. 485; Guion v. Knapp, 6 Paige, 35; s. c. 29 Am. Dec. 741; Young v. Guy, 87 N. Y. 457; Small v. Stagg, 95 Ill. 39.

⁴ Brewster v. Carnes, 103 N. Y. 556; s. c. 5 Cent. Repr. 382; 9 N. E. Repr. 223; James v. Brown, 11 Mich. 25, cited in 1 Jones on Mort., §562,

notice of a subsequent mortgage—and the principle applies to a subsequent deed as well¹—may, without receiving anything on the mortgage debt, release any portion of the mortgaged property to the mortgagor, without impairing his security upon the remainder of the whole mortgage debt; although if he had notice of a mortgage or sale of any part of the remaining property, he might be required to abate a proportionate part of the mortgage debt in order to protect the subsequent purchaser or mortgagee.² The authorities, however, are not agreed in the application of the rule, and there are cases holding that the subsequent record is notice to the prior mortgagee.³ Thus, where the mortgage was to secure future advances, it was held to be effectual only from the time, or times, the advances were made, and that it was the duty of the mortgagees, before making advances under it to examine the records and see

and more fully in 1 Dev. on Deeds, §715; *Birnie v. Main*, 29 Ark. 591; *Deuster v. McCamus*, 14 Wis. 509; *Blair v. Ward*, 10 N. J. Eq. 119; *George v. Wood*, 9 Allen, 80; *Taylor v. Maris*, 5 Rawle, 51; *Halstead v. Bank of Ky.*, 4 J. J. Marsh. 555; *Leiby v. Wolf*, 10 O. 83.

¹ *Cook v. Dillon*, 9 Iowa, 407; *Baldwin v. Thompson*, 15 Iowa, 504, and cases above.

² 1 Jones on Mort., §562, citing cases above. Where the subsequent incumbrance is a mechanic's lien, the mere fact that the building was begun after the mortgage was given, and that the mortgagee knew this, is not sufficient to charge him with knowledge of the lien. *Ward v. Hague*, 25 N. J. Eq. 397; and see also, *Brooks v. Lester*, 36 Md. 65; *McIlvain v. Mutual, etc., Co.*, 93 Pa. St. 30.

A knowledge of the facts that a part of the land mortgaged had been sold to a purchaser who had recorded his deed, taken actual possession and made improvements, held sufficient to put the mortgagee upon inquiry before releasing other parts of the whole tract. *Dewey v. Ingersoll*, 42 Mich. 17. See further as to actual notice, 1 Dev. on Deeds, §717; *Hall v. Edwards*, 43 Mich. 473; *Gilbert v. Haire*, *Id.* 283; *Cogswell v. Stout*, 32 N. J. Eq. 240; *Cheever v. Fair*, 5 Cal. 337.

³ 1 Jones on Mort., §372; *Parmentier v. Gillespie*, 9 Barr, 86; *Ter-Hoven v. Kerns*, 2 Barr, 96; *Spader v. Lawler*, 17 O. St. 371; *Bank's Appeal*, 36 Pa. St. 170; s. c., *sub nomine*, *Parker v. Jacoby*. 3 Grant's Cas. 300; *Stone v. Welling*, 14 Mich. 514; *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. 49; *Frye v. Bank of Ill.*, 11 Ill. 367; *Ketcham v. Wood*, 22 Hun. 64; *Boswell v. Goodwin*, 31 Conn. 74; s. c. 12 Am. Law Reg. 79, and note citing most of the above cases.

whether liens of other parties had not attached in the meanwhile.¹

§165. Priority in Registration.

One object of the registry acts is to secure an early public record of conveyances and titles, and under their operation the priority which at common law a first purchaser acquired over any later one from the same grantor may be lost by a failure to register the earlier conveyance promptly, or within the statutory time. In this general sense priority of title under the registry system depends, except as it may be affected by actual notice, in a material degree upon priority of record. The leading design of registry is to protect subsequent parties,² not to confer additional rights because of its being made. Registration is exacted as a condition upon which the common law priority of the first purchaser shall be retained, but equity will not suffer it to become a means whereby fraud shall be made more effectual, and hence a party having actual notice of another's rights cannot claim its protection as against those

¹ *Ladue v. Detroit & M. R. R.*, 13 Mich. 380; s. c. 87 Am. Dec. 759; *Bank's Appeal*, *supra*; *McClure v. Roman*, 52 Pa. St. 458; *Spader v. Lawler*, 17 Ohio, 371. As to the inconvenience of requiring the mortgagees to search the records before making each advance, the court, in the Michigan case above, say that in truth it is very slight. At each succeeding advance they have only to look back to the date of the last advance, which would ordinarily be the work of but a few minutes, and much less inconvenience than they submit to in their usual business of lending money, in making inquiries as to the responsibility, the signatures and identity of parties to commercial paper. For fuller quotation of this decision, see 1 *Jones on Mort.*, §372, note. As to the equities of subsequent lien holders, see *Turner v. Phelps*, 46 Tex. 251; *Byler v. Johnson*, 45 Tex. 509; *Breedlove v. Ewing*, *Id.* 47; *Watson v. Spence*, 20 Wend. 264; *Haines v. Beach*, 3 Johns. Ch. 459; *Peto v. Hammond*, 29 Beav. 91; *Turbeville v. Gibson*, 5 Heisk. 374; *Weathersbee v. Farrar*, 90 N. C. 106.

If the mortgagee reserves an option, then each advance is a new mortgage; but if he is bound to advance, then they all relate back to the date of the instrument and have priority over subsequent liens. *Tompkins v. Little Rock Ry. Co.*, 15 Fed. Repr. 6; and see also, *Boswell v. Goodwin*, 31 Conn. 74; s. c. 81 Am. Dec. 169; *Tully v. Harloe*, 35 Cal. 302; s. c. 95 Am. Dec. 102.

² *Wade on Notice*, §162; 1 *Jones on Mort.*, §576.

rights.¹ In its general result of benefit and protection to the public, the system is equitable and beneficent in its operation; but the simple act of registry in compliance with the duty of giving notice, is not a matter of such intrinsic merit as can of itself justly lend any important advantage to the person making it. At an early day a court of equity denied any advantage whatever from priority in registration to a party chargeable with actual notice of the prior adverse right at the time he purchased,² and this rule has since been adhered to, although it seriously breaks in upon the symmetry of the registry system. The policy of admitting proof of actual notice to affect the priority of registry has been much questioned, because such course is attended with the dangers and uncertainties incident to parol evidence when used for the purpose of affecting written instruments and disturbing titles.³ The doctrine, however, that actual notice shall be equivalent to registry in its effect, is too deeply grounded in natural equity to be shaken; and supported by both statute and decision, it now prevails in all the states except Louisiana, with very limited exceptions elsewhere, relating principally to mortgages.⁴

¹ *Ante*, §12; *post*, ch. IX; *Patterson v. De La Ronde*, 8 Wall. 292; 2 Pom. Eq. Jur., §660.

² *Le Neve v. Le Neve*, 1 Ves. 64; s. c. 1 Amb. 436; *Ford v. White*, 16 Beav. 120. The decision in the first case was put upon the ground of fraud. The fraud in that case, however, was only constructive, and the rule more properly rests upon the reason that as registry is designed to give notice, it can justly serve no purpose with reference to a party who already has the notice. 2 Pom. Eq. Jur., §665.

³ It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance; but they have said, "we cannot permit fraud to prevail." *Wyatt v. Barwell*, 19 Ves. 435; and see *post*, ch. IX; 2 Lead. Eq. Cases (*White & Tudor*, 4th Am. ed.), 109 *et seq.* The courts, it is said, are not disposed to push the doctrine by construction further than it has been already carried. *Vice-Chan. Wigram, in Weet v. Reid*, 2 Hare, 260.

⁴ In Arkansas, a mortgage recorded on a bad acknowledgment creates no lien against a third party, although he have actual notice of the mortgage. *Dodd v. Parkes*, 40 Ark. 526; *Fry v. Martin*, 33 Ark. 203; Ark. Dig. (1874), §§4287-8. So, in several other states, by the terms of whose statutes record is made essential to the validity of the mortgage.

§166. Priority in the Record of Conveyances from Same Grantor.

One result growing out of the establishment of the registry system has been the creation, in favor of a subsequent purchaser, of an equity that did not before exist. Prior to that time there was no obligation on the part of a purchaser to spread his conveyance on the public records,¹ and no equity could therefore arise in favor of a subsequent purchaser by reason of this not having been done. But after the requirement of law that registration should be made, a subsequent purchaser who found upon the records no conveyance of the property from his grantor, had in reason and equity, as well as law, a right to conclude, unless he had actual notice to the contrary, that no such conveyance had been made, and that he might buy with safety. When, in such case, a prior conveyance has been made but not recorded, the equities of the subsequent purchaser exist by reason of the *laches* of the first, and they attach as soon as he has parted with a valuable consideration on the faith of the unincumbered record.² His rights in the premises, whether considered as legal or equitable, cannot justly be

Home Build. Ass'n v. Clark, 43 O. St. 427; Bercaw v. Cockerill, 20 O. St. 163; Mayham v. Coombs, 14 Ohio, 428; Robinson v. Willoughby, 70 N. C. 358; Fleming v. Bergin, 2 Ired. Eq. 584; Sturgess v. Bank, 3 McLean, 140; Leggett v. Bullock, Busb. 283; Bank v. M'fng Co., 96 N. C. 298; s. c. 3 S. E. Repr. 363; *post*, §217; Bird v. Wilkinson, 4 Leigh, 266; Moore v. Thomas, 1 Or. 201.

Under N. Y. Rev. Stats., p. 738, §137, which declares that grants in fee of freehold estates shall not take effect as against purchasers and incumbrancers until acknowledged and attested, a subsequent purchaser takes the title as against a prior deed not acknowledged and attested, even though he have actual notice of it, and regardless of the purpose or consideration of the second deed. Chamberlain v. Spargur, 86 N. Y. 603; s. c. 22 Hun. 437; Nellis v. Munson, 108 N. Y. 453, 457.

Under the statutes of Louisiana record is, as against third persons, essential to the validity of deeds, and the doctrine of actual notice is not recognized. McCoy v. Rhodes, 11 How. (U. S.), 131; Harang v. Plattsmier, 21 La. Ann. 426; Tulane v. Levison, 2 *Id.* 787; Payne v. Pavey, 29 *Id.* 116; Berwin v. Weiss, 28 *Id.* 363.

¹ *Ante*, §1; Clarke v. White, 12 Pet. 178.

² Boggs v. Varner, 6 Watts & S. 469, 474; Brownback v. Ozias, 117 Pa. St. 87, 93; s. c. 11 Atl. Repr. 30; 9 Cent. Repr. 554.

taken from him by the bare fact of the record of the prior conveyance being then made ahead of his own, although some of the statutes permit this to be done. An earlier record by the first purchaser is, under these circumstances, entitled to no such reward, although the rule might be justified to some extent in a case where there had been unreasonable delay in recording on the part of the subsequent purchaser. The statutes of about one third of the states,¹ aiming perhaps at the encouragement of early registration in general,² make the rights of the subsequent purchaser dependent upon his obtaining the prior record; but where this is not the letter of the law, or a necessary result of its terms, such a rule does not obtain, and priority of record will not defeat the rights of the subsequent purchaser who has bought in good faith and for valuable consideration.³

¹ *Ante*, §13, note. In several states the statutes neither require that the subsequent conveyance shall be first recorded, nor do they in terms declare an unrecorded conveyance void as against a subsequent purchaser in good faith. In Connecticut and Vermont, for instance, the statutes provide only that, until recorded, the conveyance shall not be effectual to pass title except as against the grantor and his heirs; while in North Carolina the act merely prescribes that conveyances shall be recorded within two years. Wherever, under the terms of the statute, actual notice is of no effect whatever, priority of record is of necessity the only criterion by which, under the operation of the registry acts, priority of right can be determined. This is the case in Louisiana; and also as to mortgages, in Arkansas, North Carolina and Ohio, under statutes separate from those relating to the registry of the deeds. So wherever, under the terms of these exceptional statutes, registry is made essential to title passing, it may be contended to better advantage that the subsequent deed must be first recorded in order to give it the effect of priority. See, however, *Wheaton v. Dyer*, 15 Conn. 307.

² This is the reason assigned by Mr. Sugden for the rule in England; but it may be observed that in some states, as Pennsylvania and Georgia, where the statutes follow the English rule, early registration does not seem to be a very special object of the statutes, since they allow six and twelve months for registry.

³ *Ante*, §§13-15; *Steele v. Spence*, 1 Pet. 552; *Coster's Executors v. Bank of Ga.*, 24 Ala. 37; *Ranney v. Hogan*, 1 Tex. Un. Cas. 253; *Coleman v. Barklew*, 3 Dutch. 357; *De Courcey v. Collins*, 21 N. J. Eq. 357; *Sanborn v. Adair*, 29 N. J. Eq. 338; *Northrup v. Bremer*, 8 Ohio, 392; *Hawley v. Bennett*, 5 Paige, 104; *Jackson v. Center*, 19 Johns. 281. See also, *McGuire v. Barker*, 61 Ga. 339; *Chaffe v. Halpin*, 62 Miss. 1; *Bennett v. Fowkes*, 1 Neb. 465; *Gardner v. Early*, 72 Iowa, 518; s. c. 34

Our text writers, in discussing the law of priority, have usually stated the propositions on this subject in such general terms as seem to make priority of title in all cases where the purchaser is not chargeable with actual notice, dependent entirely on priority of record.¹

N. W. Repr. 311; Byrd v. Wilcox, 8 Baxt. 65, 68; Tabor v. Sullivan (Colo.), 20 Pac. Repr. 437; Swigert v. Bank of Ky., 17 B. Mon. 268.

In cases decided under statutes making the rights of the subsequent purchaser dependent on priority of record, it is admitted that but for the statute the rule would be different, and as stated in the text. Fallass v. Pierce, 30 Wis. 443; Galway v. Malchow, 7 Neb. 285.

In some of the states, as between an attachment or judgment creditor and the grantee in an unrecorded deed, the former is preferred. McFadden v. Worthington, 45 Ill. 362; Martin v. Dryden, 1 Gilm. 187; *post*, §§193-196. But where the statute gives priority to the deed first recorded, the creditor's preference must be secured by the earlier record of a deed based on the judgment or attachment. Harrall v. Gray, 10 Neb. 186; s. c. 4 N. W. Repr. 1040; Hoag v. Howard, 55 Cal. 564.

¹ Thus, by Mr. Devlin: "Priority of title is determined, aside from the question of notice, by priority of record. The conveyance which is first recorded takes precedence, although it may not have been the deed first executed." 1 Dev. on Deeds, §626.

Thus, by Mr. Wade: "Under statutes which prescribe no time within which instruments may be recorded, the courts have generally regarded the first recorded of two instruments as the one entitled to precedence." Wade on Notice, §256. He immediately proceeds to criticize, however, for the want of any equity, a case wherein an Ohio mortgage, taken with notice, was given preference under the statute, because of priority of record. Anketel v. Converse, 17 O. St. 11.

By Mr. Jones: "A junior mortgage, duly recorded, without notice of a prior unrecorded mortgage, has precedence of it; in other words, the mortgages take precedence in the order of record." 1 Jones on Mort., §558.

By Mr. Pomeroy: "The right created by a prior unrecorded instrument is generally regarded as tantamount to an equitable interest which may, therefore, be cut off by a subsequent purchaser who is in all respects *bona fide*, and who has also obtained the first record." 2 Eq. Jur., §758.

In Sanborn v. Adair, 29 N. J. Eq. 338, the reasoning of the court in favor of the rule as given in the text is quite full. The law, it is stated, says that by failure to have the deed recorded in fifteen days, it shall be void and of no effect against the subsequent deed, or mortgage, or judgment, and in that condition it must remain. The contrary interpretation would interpolate in the act the words, "unless it is recorded before the subsequent deed is recorded, priority of registry maintains priority of lien as to mortgages, but as to deeds the rule is different. The statute as to deeds and mortgages was the same in Den v. Richman, 1 Green, 43." So, in De Courcey v. Collins, 21 N. J. Eq. 357, it is said that the statute prescribes but a single condition to give the second

§167. Priority—Continued.

Priority will not, as already stated, protect any but a *bona fide* purchaser.¹ Where the statute allows a given time within which conveyances may be recorded, the prior record of the later instrument will be of no avail if the first be then recorded within its statutory time, as the subsequent record in such case relates back to the execution of the conveyance.² Where, under such statute, neither of two deeds of the same property by the same grantor was recorded within its statutory period, it was held that the prior record of the junior purchaser's deed was of no avail because it was not notice to the first purchaser; and also that he was without equity because the date of his purchase chanced to fall within the year allowed for the record of the first deed.³ The want of law and equity, however, seems to be in this decision rather than in the junior purchaser's case.⁴ A simultaneous conveyance is not a subsequent conveyance. Hence, where two simultaneous mortgages are made under an agreement that they shall be equal liens, the instrument priority over the first one not registered, *viz: bona fides* in the party taking it; and it is not competent for the courts to require priority of record as a second condition.

"There is nothing," said Justice A. S. Walker, in *Ranney v. Hogan*, 1 Tex. Un. Cas. 257, "in the terms of the law, nor in any decisions upon it, which countenances the view that the unregistered deed, declared by the statute void as to such purchaser, can be validated as against him by securing its earlier registration." See *ante*, §§13-15.

¹ *Vance v. Masterson*, 3 Humph. 619; *Bledsoe v. Rogers*, 3 Sneed, 466; *Wyatt v. Elam*, 19 Ga. 335; *Mitchell v. Aten*, 37 Kan. 33; s. c. 1 Am. St. Rep. 231; 14 Pac. Repr. 530; *Smith v. Yulee*, 31 Cal. 180; s. c. 89 Am. Dec. 167.

² *Den v. Richman*, 13 N. J. L. (1 Green), 43; and see *ante*, §132; *Vreeland v. Claffin*, 24 N. J. Eq. 313.

³ *Martin v. Williams*, 27 Ga. 406.

⁴ See *ante*, §133, and cases there cited, also *Lightner v. Mooney*, 10 Watts, 407; *Souder v. Morrow*, 33 Pa. St. 83, and *Northrup v. Bremer*, 8 Ohio, 393, holding that in such case the prior record of the second deed gives it preference.

A provision in the California Code, repealed in 1874, which allowed the grantee one day for every twenty miles between his residence and the recording office for recording his deed, was held subject to the provision that the conveyance first recorded had precedence. *Odd Fellows Bank v. Banton*, 46 Cal. 603.

prior record of one gives it no preference over the other under a statute declaring an unrecorded conveyance void as against a *subsequent* conveyance first recorded, even though the recorded mortgage has been transferred to a purchaser without notice of the agreement.¹

§168. Conveyances and Records of Same Date.

In Virginia it is enacted by statute that of two conflicting deeds of the same property executed on the same day, the one first recorded has preference;² and this rule obtains generally in the absence of such statute.³ Of course the second deed must have been taken without actual notice of the first; and as *laches* in not recording cannot in this instance be attributed to the first purchaser, the equities of the parties are equal and the law should prevail. In cases of this kind fractions of a day will be taken into consideration;⁴ and where there is a question as to which of two instruments deposited for record on the same day was first filed, parol evidence will be admitted to determine it.⁵ Where two mortgages executed at different dates are recorded on the same day, and there is nothing to show which was in fact first recorded, it has been held that the presumption of law is that the recording of them was concurrent, and each party stands charged with notice of the equities of the other on that day, at the same moment. In such case

¹ *Greene v. Warnick*, 64 N. Y. 220, reversing *Greene v. Deal*, 4 Hun. 703. But see to the effect that a *bona fide* assignee may obtain priority by his earliest record. *Corning v. Murray*, 3 Barb. 652.

² Code (1873), ch. 114, §9; Code of Va. (1887), §2469.

³ *Stebbins v. Duncan*, 108 U. S. 32; *Coleman v. Carhart*, 74 Ga. 392; *Brookfield v. Goodrich*, 32 Ill. 363. See *Koevenig v. Schmitz*, 71 Iowa, 175; s. c. 32 N. W. Repr. 320.

⁴ *Wood v. Lordier* (Ind.), 18 N. E. Repr. 34; *Gibson v. Keyes*, 112 Ind. 568; s. c. 14 N. E. Repr. 591; 12 West. Repr. 182; *Lemon v. Staats*, 1 Cow. 592. See *Hunt v. Dunn*, 74 Ga. 120.

⁵ *Spaulding v. Scanlan*, 6 B. Mon. 363. Where neither of two recorded deeds was entitled to registration because of defective acknowledgment, it was held that the effect of a validating statute passed subsequently, was to record both deeds at the same instant of time, and hence left them to operate as at common law, by which the one first executed would pass the title. *Deininger v. McConnell*, 41 Ill. 228.

the one prior in its execution has been treated as having the superior equity.¹ As between liens executed and recorded on the same day, priority by a few hours in the execution or recording of the one will, in some instances, be subordinated to the superior equity of the other.²

¹ *Houfes v. Schultze*, 2 Bradw. (Ill.), 196; s. c. 11 Chicago Leg. N. 75; 1 Jones Mort., §566. But see *Powers v. Lafler*, 73 Iowa, 283, in next note.

² As where the lien last recorded is to secure purchase money due on the property. Thus, a trust deed was given to the vendor to secure a balance of purchase money, and was recorded on the same day with the deed from the vendor, but a few hours after the record of another deed of trust on the property given by the vendee to one who furnished the money to make the cash payment, and it was held that the one to the vendor had the prior lien. *Rogers v. Tucker*, 94 Mo. 346; s. c. 7 S. W. Repr. 414.

Two mortgages, each taken without notice of the other, were delivered by the mortgagor by handing them to the clerk for record, first one and immediately the other, without any statement that it was intended thereby to give one precedence over the other. Held a simultaneous delivery, and that it was immaterial which mortgage was executed first, and that one of them was given to secure purchase money due on the premises. *Koevenig v. Schmitz*, 71 Iowa, 175; s. c. 32 N. W. Repr. 320.

Where a mortgage and a judgment against the mortgagor were entered of record on the same day, it was held that *prima facie* they would be treated as taking effect simultaneously; but a verbal agreement between the parties that the mortgage was to have precedence as notice would be binding upon them, but not upon a *bona fide* assignee of the judgment. *Hendrickson's Appeal*, 24 Pa. St. 363.

Both of two mortgages were executed the same day, but defendant's first; both were recorded the next day, but plaintiff's first. Plaintiff's mortgage was taken with notice to the mortgagee therein, plaintiff's assignor, of defendant's senior mortgage, and with intent to give such mortgagee a fraudulent prior lien. After both were recorded, and before plaintiff's mortgage became due, he purchased it for value, in good faith and without actual notice of the prior execution of defendant's mortgage. Held, that as both mortgages bore the same date, there was nothing in the record to charge plaintiff with constructive notice of the prior execution of defendant's mortgage, and that plaintiff was entitled to priority. *Powers v. Lafler*, 73 Iowa, 283, distinguishing *English v. Waples*, 13 Iowa, 57, and *Sims v. Hammond*, 33 *Id.* 368. It is also intimated that *English v. Waples* conflicts with *Vandercook v. Baker*, 48 Iowa, 199, and is not entirely sound.

If the statute gives precedence to priority of record, and recognizes fractions of a day in requiring the recorder to note the hour and minute of the filing for record, priority as between mortgages executed and recorded on the same day would depend on priority of record. If the statute give no preference to priority of record, then, under the de-

§169. Priority in Record of Liens.

Liens exist under such a variety of circumstances that priority between them is determined by quite a number of considerations, including, in some instances, priority of record, even in states whose statutes do not make the precedence given to a subsequent conveyance dependent on its prior registration.¹ Thus it is held in Texas that as between a mortgage on land, and a judgment rendered in a county other than that wherein the land is, priority of lien will be determined by priority of registration in the county where the land lies.² In some of the states, as between a judgment or attaching creditor and the grantee in an unrecorded conveyance, the former is preferred;³ but in Nebraska, under a statute providing that unrecorded deeds are void as to all creditors and subsequent purchasers in good faith "whose deeds, mortgages or other instruments shall be first recorded," it is held that the judgment lien of a creditor having no *instrument* first recorded, extends only to the actual interest of the debtor in the land, and is subordinate to an unrecorded deed.⁴ A statutory sheriff's certificate of sale will answer for an instrument.⁵ Where a dif-

cisions cited *ante*, §§13-15, 166, it would seem that the equities of the second purchaser would be at least equal to those of the first.

¹ As to priorities with reference to mechanics' liens, see *ante*, §45; *Stuyvesant v. Browning*, 33 N. Y. 203; judgment and attachment liens, §§42-44. In Kansas a mortgage executed before, but not recorded until after, the levy of an attachment takes priority, though the creditor had no notice of it. *N. W. Co. v. Mahaffey*, 36 Kan. 152; s. c. 12 Pac. Repr. 705.

² *Firebaugh v. Ward*, 51 Tex. 409. Where there has been a sale of real estate by an insolvent debtor for the purpose of defrauding his creditors, and the fraudulent grantee has conveyed the premises to an innocent grantee for value, as between creditors of the debtor and the innocent purchaser, the law will favor the most vigilant. *Chouteau v. Jones*, 11 Ill. 300.

³ *Martin v. Dryden*, 1 Gilm. 187; *Massey v. Wescott*, 40 Ill. 160; *McFadden v. Worthington*, 45 Ill. 362; *Richeson v. Richeson*, 2 Gratt. 497. See *post*, §§192, 196; 2 Pom. Eq. Jur., §721, and numerous cases there cited; *Stevenson v. Texas*, 15 Otto, 703.

⁴ *Galway v. Malchow*, 7 Neb. 285; *Harrell v. Gray*, 10 Neb. 186; s. c. 4 N. W. Repr. 1040.

⁵ *McMurtrie v. Riddell*, 9 Colo. 497; s. c. 13 Pac. Repr. 181; *Hazard v. Cole*, 1 Idaho, 276.

ferent lien is substituted for one already recorded, the question frequently arises as to whether the precedence of the first lien is lost as against an intervening recorded lien. This depends to such an extent upon both the intent of the parties and the mode in which it is consummated, that it is difficult if not impossible to formulate any general rule on the subject.¹ The matter is illustrated by the cases in the foot notes.² Purchase money mortgages frequently present in-

¹ 2 Pom. Eq. Jur., §719. A mortgage given to correct a misdescription of the land in a former one, was held to have priority over an intervening mortgage. *Clark v. Ballard*, 66 Iowa, 747, and see also, *Council Bluffs v. Billups*, 67 *Id.* 674. So, where an existing vendor's lien was subsequently changed into a mortgage lien, the mortgage was given priority over an intervening mechanic's lien. *Thorpe v. Durbon*, 45 Iowa, 192.

A. having repaid a portion of borrowed money due to B., the mortgage securing the loan was released, and A. then executed to B. a new mortgage to secure the balance. On the same day A. obtained a loan from C., and executed to him a mortgage on the same property; the execution of C.'s mortgage being about three hours later than that of the new one to B. But the release and the mortgage to C. were recorded two hours earlier than B.'s new mortgage. The statute gave precedence to the mortgage first recorded, and C.'s having been taken without actual notice of the new one, had priority. *Swartz v. Chickering*, 58 Md. 290; and see, to same effect, *Smith v. Lowry*, 113 Ind. 37; s. c. 15 N. E. Repr. 17; *Burke v. Abbott*, 103 Ind. 1; s. c. 57 Am. Rep. 474; 1 N. E. Repr. 485.

² A. loaned money to B. to take up a mortgage owned by C., and took a mortgage from B. for the money loaned, not knowing of a judgment lien against the land second to the mortgage, but duly of record. Held that A. could not afterwards be subrogated to the rights of C., so as to have priority over the judgment. *Mather v. Jenswold*, 72 Iowa, 550; s. c. 32 N. W. Repr. 331, citing *Warner v. Waterloo*, 62 Iowa, 699; s. c. 14 N. W. Repr. 331. So, where K. paid off and discharged the first and second of three successive mortgages, a new mortgage to him for their amount did not obtain priority over the third one. *Kitchell v. Mudgett*, 37 Mich. 81; and for case where priority of lien was denied to a new mortgage given as a substitute for a former one, see *Smith v. Bynum*, 92 N. C. 108.

But where a mortgage lien existed which was prior to a judgment lien on the same land, and the mortgagee, not knowing of the judgment lien, permitted the mortgage to be taken up and a new one given in its stead, embracing a further advance, it was held that the substitute mortgage, to the amount of the former one, was but a renewal and entitled to priority. *Young v. Shauer*, 73 Iowa, 555; s. c. 5 Am. St. Rep. 701; citing *Bruce v. Nelson*, 35 Iowa, 157, and distinguishing *Mather v. Jenswold*, *supra*; *Warner v. Waterloo*, *supra*; *Weidner v. Thompson*, 69

stances in which a substituted mortgage is allowed the priority of the former one for which it is a substitute.¹ By the common law the priority of liens, whether by judgment or mortgage, is governed exclusively by the date of their acquisition; the first in order of time standing first in rank.² This order may be controlled by contract, or by a statutory priority in registry, and sometimes by the application of the rule that equality is equity.³ Where the registry act gives priority and a junior mortgage is first recorded, the burden of proof is on the older mortgagee to show that such junior mortgagee had actual notice of his prior mortgage.⁴

§170. Priority in Record of Mortgages.

A mortgage is a conveyance, and a mortgagee is a purchaser,⁵ and the law as to priority of record, in its general

Iowa, 36; s. c. 28 N. W. Repr. 422, and *Goodyear v. Goodyear*, 72 *Id.* 329; s. c. 33 N. W. Repr. 142, as being cases in which the parties seeking to revive satisfied mortgages were neither the mortgagees nor their assignees, but purchasers of the mortgaged property, or persons who sought to be subrogated to the rights of the mortgagees by reason of having paid the mortgages. See for other cases, *Eggeman v. Eggeman*, 37 Mich. 436; *Hendrickson's Appeal*, 24 Pa. St. 363; *Trader's Bank v. Woodlawn Co.*, 100 N. C. 345; 5 S. E. Repr. 81; *Bank v. Manufacturing Co.*, 96 N. C. 298; 3 S. E. Repr. 363; Code of N. C., §§1254, 1271; *Smith v. Lowry*, 113 Ind. 37; *Burke v. Abbott*, 103 Ind. 1; s. c. 57 Am. Rep. 474.

¹ See *post*, §172; *Curtis v. Root*, 20 Ill. 53; *Austin v. Underwood*, 37 Ill. 438; *Jackson v. Austin*, 15 Johns. 477; *Adams v. Hill*, 29 N. H. 202.

In Georgia, a judgment rendered before a mortgage is recorded on a debt older than the date of the mortgage, has the superior lien, though the mortgage may have been foreclosed when the judgment was rendered. *Richards v. Myers*, 63 Ga. 762.

A mortgagee waives any claim to priority by agreeing with the mortgagor to withhold his mortgage from record to enable the mortgagor to get further credit. *Hendrickson v. Woolley*, 39 N. J. Eq. (12 Stew.), 307.

² *Westervelt v. Voorhis*, 42 N. J. Eq. 179; s. c. 6 Atl. Repr. 665; *Deininger v. McConnell*, 41 Ill. 228.

³ *Shields v. Dyer*, 86 Tenn. 41, 44; s. c. 5 S. W. Repr. 439, citing *Christian v. Clark*, 10 Lea. 630.

⁴ *Hendrickson v. Woolley*, 39 N. J. Eq. (12 Stew.), 307; and see *Gardner v. Early*, 72 Iowa, 518; s. c. 34 N. W. Repr. 311.

⁵ *Post*, §209; *Schell v. Stein*, 76 Pa. St. 398; s. c. 18 Am. Rep. 416; *Coster's Executors v. Bank of Ga.*, 24 Ala. 37; *Westbrook v. Gleason*, 79 N. Y. 23; 2 Pom. Eq. Jur., §721, last note; *Fargason v. Edrington*, 49 Ark. 207, 214; *Gilchrist v. Gough*, 63 Ind. 576; s. c. 30 Am. Rep. 250.

principle, applies to mortgages as well as to deeds. Frequently, however, the characteristics of mortgages, and the equities pertaining to them, are such, as where they are simultaneous, or given to secure purchase money, or pre-existing debts, and the like, that priority in their registration is often given or denied effect according to the circumstances and equities of particular cases and classes of mortgages.¹ Resting in part on the ground that a simultaneous conveyance is not a subsequent conveyance, and partly on the equities of the matter, is the rule that the recording acts have, primarily, no application to mortgages executed and recorded simultaneously.² If two mortgages on the same land be given at the same time to the same person, it is held that an earlier record of one will not give it any precedence over the other, even as between assignees. The original holder, of necessity, has notice of both mortgages, and in the hands of different assignees they are held to be concurrent liens, payable ratably if necessary.³ If both of two mortgages of the same property, or either of them, contain a stipulation that they are to be simultaneous, or a statement that they are to be equal liens, or that both were

¹ *Vredenburg v. Burnet*, 31 N. J. Eq. 229; *Trustees v. Fenno*, 67 Iowa, 244; s. c. 25 N. W. Repr. 152. A recorded mortgage, although to secure a pre-existing debt, held to take over an unrecorded one given to secure payment for machinery furnished in the construction of a mill on the premises, the mortgagee in the recorded mortgage having no notice of the other one. *Hayner v. Eberheart*, 37 Kan. 308; s. c. 15 Pac. Repr. 168. For other instances, see cases in the notes to the next preceding section.

² 1 *Jones on Mort.*, §566; *Greene v. Warnick*, 64 N. Y. 220; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Purdy v. Huntington*, 42 N. Y. 334; s. c. 1 Am. St. Rep. 532.

Where two mortgages are of even date and intended to be simultaneous, but recorded on different days, the fact that the one recorded on the later day bore an acknowledgment of an earlier date, does not show that it was intended to be the prior security. *Gausen v. Tomlinson*, 23 N. J. Eq. 405.

³ *Collerd v. Huson*, 34 N. J. Eq. (7 Stew.), 38; *Gausen v. Tomlinson*, *supra*; *Howard v. Chase*, 104 Mass. 249; *Vredenburg v. Burnet*, 31 N. J. Eq. (4 Stew.), 229. See *Powers v. Lafler*, 73 Iowa, 283; *Greene v. Deal*, 4 Hun. 703.

given for purchase money, then the earlier record of the one will give it no priority either in the hands of the mortgagee or of an assignee.¹ But where simultaneous mortgages are given to different persons as parts of the same transaction, each having notice of the other, their priorities, as between the mortgagees, will depend upon the equities pertaining to them without reference to the order of their registry.² If, however, one of these mortgages be assigned to a purchaser for value and without notice, he may, by obtaining the earliest record, secure priority over the other which has intrinsically a superior equity.³

§171. Record of Mortgages—Continued.

Where a recorded deed in one's chain of title shows that such deed was made subject to a mortgage specified therein, a subsequent purchaser is put on inquiry as to the condition of the mortgage, and takes subject to it.⁴ Delay in fil-

¹ *Greene v. Warnick*, 64 N. Y. 220; *Westbrook v. Gleason*, 79 N. Y. 23, citing to the effect that priority of mortgages may depend upon agreement, irrespective of priority of record. *Jones v. Phelps*, 2 Barb. Ch. 440; *Freeman v. Schroeder*, 43 Barb. 618; and see also, *Shields v. Dyer*, 86 Tenn. 41, 44; *Christian v. Clark*, 10 Lea, 630; *Hendrickson v. Woolley*, 39 N. J. Eq. (11 Stew.), 307; *Corbin v. Kincaid*, 33 Kan. 649; s. c. 7 Pac. Repr. 145; *Mut. Loan Co. v. Elwell*, 38 N. J. Eq. 18.

² *Pomeroy v. Latting*, 15 Gray, 435; *Rhodes v. Canfield*, 8 Paige, 545; *Sparks v. State Bank*, 7 Blackf. 469; *Jones v. Phelps*, *supra*; *Jones on Mort.*, §567.

³ *Corning v. Murray*, 3 Barb. 652; *Decker v. Boice*, 19 Hun. 152; *Powers v. Lafler*, 73 Iowa, 283.

Where the same attorney executes a second mortgage of the same property to a different person, and it is first recorded, it is entitled to priority over the former one. *Hope v. Camberling*, 1 Hun. 571; *Dusenbury v. Hurlbut*, 59 N. Y. 541.

The priority of mortgages may be determined by agreement of the parties. *Corbin v. Kincaid*, 33 Kan. 649; s. c. 7 Pac. Repr. 145. A mortgage to secure future advances is enforceable only for the amount advanced. *Vogan v. Caminette*, 65 Cal. 438; and the lien attaches only from the time the advances, and each of them, are actually made. *Nicklin v. Betts*, 11 Or. 406; s. c. 50 Am. Rep. 477; 5 Pac. Repr. 51; *Morris v. Cain*, 39 La. Ann. 712; s. c. 2 South. Repr. 418; *ante*, §164.

⁴ *Smith v. Lowry*, 113 Ind. 37; *Hull v. Sullivan*, 63 Ga. 126; *Lowry v. Smith*, 97 Ind. 466; *Singer v. Scheible*, 109 Ind. 575; s. c. 10 N. E. Repr. 616; *Stockwell v. Stockwell*, 101 Ind. 1; *Coe v. Ry. Co.*, 10 O. St. 372; *Council Bluffs v. Billups*, 67 Iowa, 674; s. c. 25 N. W. Repr. 846;

ing a mortgage for record, though it be for as much as six or seven years, is not, in itself alone, a fraud upon subsequent creditors such as to postpone it to their judgments;¹ nor will delay in foreclosure give any rights to subsequent purchasers from the mortgagor.² Where a mortgage is recorded, such record is notice to the world, and silence of the mortgagee, or neglect on his part to give personal notice of it, is not such *laches* as will preclude him from asserting it against a subsequent purchaser without notice.³ If, however, such mortgagee be guilty of positive and intentional fraud or misrepresentation such as operates to the injury of the subsequent purchaser, he will be estopped thereby.⁴ If the mortgage as copied on the record does not disclose the rate of interest, it is a lien as against third parties for only the legal rate, although a higher rate be really stipulated in the instrument or by parol agreement.⁵ A subsequent purchaser or mortgagee has the right to redeem a prior mortgage according to its terms; and hence a subsequent agreement between the mortgagor and the first mortgagee, changing the rate of interest or extending the time, is not

Ætna Life Ins. Co. v. Bishop, 69 Iowa, 645; *Howard v. Chase*, 104 Mass. 249.

¹ *Thomas v. Kelsey*, 30 Barb. 268.

² *Fry v. Schee*, 55 Ga. 210; *Dick v. Balch*, 8 Pet. 30; *N. Y. Life Ins. Co. v. Covert*, 6 Abb. N. S. 154.

³ *Clabaugh v. Byerly*, 7 Gill. 354; *Rice v. Dewy*, 54 Barb. 455; *Dick v. Balch*, *supra*; *Story Eq. Jur.*, §391; 1 *Jones on Mort.*, §603, citing *Paine v. French*, 4 Ohio, 318; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Palmer v. Palmer*, 48 Vt. 69; *Marston v. Brackett*, 9 N. H. 336.

⁴ *Platt v. Squire*, 12 Metc. 494; *Mitchell v. Aten*, 37 Kan. 33; s. c. 14 Pac. Repr. 530; 1 *Am. St. Rep.* 231; *Broome v. Beers*, 6 Conn. 198; *Fay v. Valentine*, 12 Pick. 40; *Stafford v. Ballou*, 17 Vt. 329; *Chester v. Greer*, 5 Humph. 26; *Miller v. Bingham*, 29 Vt. 82. and authorities in last note above.

So, if a mortgagee, having actual notice of a second mortgage, releases part of the mortgaged premises without receiving payment of any part of his debt, to the extent of the injury done by such release, he is postponed to the second mortgage. *Bailey v. Gould*, Walk. (Mich.), 478.

⁵ *Meighen v. Strong*, 6 Minn. 177; *Taylor v. Atlantic Ry. Co.*, 55 How. Pr. 275; *Whitacre v. Fuller*, 5 Minn. 508.

binding upon the property as against such right unless duly executed and recorded.¹ Where a creditor fails to have his mortgage recorded, and thereby loses his priority over other creditors, he can, as a rule, have no relief in equity.² Under the operation of the recording acts the doctrine of tacking has no application in this country.³

¹ *Gardner v. Emerson*, 40 Ill. 296; *Davis v. Jewett*, 3 Greene, 226; *Bassett v. McDonald*, 13 Wis. 444; *St. Andrews Church v. Tompkins*, 7 Johns. Ch. 14; 1 *Jones on Mort.*, §§361, 564, 565.

An agreement for an extension duly recorded, but which does not identify the mortgage by any sufficient reference to it, is ineffectual against a subsequent purchaser without actual notice of it. *Bassett v. Hathaway*, 9 Mich. 28. Reference to a schedule attached to another mortgage recorded in the same office, held sufficient. *Newman v. Tymeson*, 13 Wis. 172; s. c. 80 Am. Dec. 735.

² *Kurtz v. Hollingshead*, 3 Cranch C. Ct. 68.

³ 1 *Lead. Eq. Cas. (White & Tudor)*, 855, note to *Marsh v. Lee*, 2 Vent. 337.

In New York a mortgage for past indebtedness takes precedence over one for future indebtedness, if taken without notice and first recorded. *Genesee Nat. Bank v. Whitney*, 103 U. S. 99.

Unless the mortgage state the amount of the indebtedness secured, its record will not be constructive notice. *Bullock v. Battenhausen*, 108 Ill. 28. Where the amount was stated, but it was further stated to be subject to a credit, without giving the amount of the credit, a junior mortgagee was preferred. *Morris v. Murray*, 82 Ky. 36; *Gen. Stats. of Ky.* ch. 43, §24. In recording a mortgage to secure six notes the recital of one was omitted, but the aggregate amount of all six was correctly given, and it was held sufficient. *Dargin v. Becker*, 10 Iowa, 571; and see *Youngs v. Wilson*, 27 N. Y. 351; *Dimon v. Dunn*, 15 N. Y. 498.

An unrecorded mortgage given by an ancestor retains its priority over a judgment recovered against the heir-at-law during the lifetime of the ancestor, although the judgment creditor had no notice of the mortgage when he recovered the judgment. The registry law applies only where the interests of subsequent judgment creditors, mortgagees and purchasers can, at the time they act, be affected by want of notice. *Voorhis v. Westervelt*, 43 N. J. Eq. 642; s. c. 3 Am. St. Rep. 315; s. c. 12 At. Repr. 533.

Where a first mortgagee advances money to save a crop, in excess of the amount secured by his mortgage, he is not entitled to such amount to the exclusion of a second recorded mortgage; the record being held notice to him. *Weathersbee v. Farrar*, 90 N. C. 106. Where a new mortgage was given as a substitute for an existing one, the priority of the lien was held to be lost as against a purchaser of the property prior to the new mortgage. *Smith v. Bynum*, 92 N. C. 108.

§172. Purchase Money Mortgages.

Mortgages given to secure unpaid purchase money have an intrinsic superiority over other liens and claims against the property in the hands of the vendee.¹ In a number of states the statutes expressly give them precedence over judgments and other debts of the mortgagor.² The courts, however, have usually done this without the aid of the statute.³ The theory upon which they have excluded the intervention of other liens and claims is that where, at the same time the deed is given there is a mortgage back by the vendee, the transactions are simultaneous, and there is but an instantaneous seizin in the purchaser, the title merely passing through him to the mortgagee.⁴ Where there is an interval of time between the deed and the mortgage back, the preference is lost and a judgment lien against the vendee or other claimant will attach.⁵ The preference in favor

¹ 2 Pom. Eq. Jur., §725; *Jacoby v. Crowe*, 36 Minn. 93; 1 Jones on Mort., §§464-466.

² Rev. Code of Miss., 1880, §1205; *Lahr's Appeal*, 90 Pa. St. 507; *Ries v. Ludington*, 13 Wis. 276; s. c. 80 Am. Dec. 741; *Tanner v. Bell*, 61 Ga. 584; and statutes of Delaware, North Carolina, Maryland, Kansas, New Jersey, Indiana and New York. In Georgia, prior to the act to this effect, dower had preference to a purchase money mortgage. *Wilson v. Peeples*, 61 Ga. 218; and even under the statute such mortgage yields to a mechanic's lien. *Tanner v. Bell*, *supra*, citing Code of Ga., §1579.

³ *Phelps v. Fockler*, 61 Iowa, 340; *Curtis v. Root*, 20 Ill. 53; *Grant v. Dodge*, 43 Me. 489; *Bolles v. Carli*, 12 Minn. 113; *Jackson v. McKenny*, 3 Wend. 233; *Kaiser v. Lembeck*, 3 Iowa, 520; *Stewart v. Smith*, 36 Minn. 82; s. c. 30 N. W. Repr. 430; *Roane v. Baker*, 120 Ill. 308; s. c. 11 N. E. Repr. 246.

As in giving such mortgage precedence over the claims of dower and homestead. *Howell v. Howell*, 7 Ired. 491; *Thompson v. Lyman*, 28 Wis. 266; *Amphlet v. Hubbard*, 29 Mich. 298; *Fletcher v. Holmes*, 32 Ind. 497; *Clark v. Monroe*, 14 Mass. 351; *Birnie v. Main*, 29 Ark. 591; *Young v. Tarbell*, 37 Me. 509; and over a mechanics' lien on the equitable estate of the vendee prior to his acquisition of a deed. *Campbell's Appeal*, 36 Pa. St. 247; s. c. 78 Am. Dec. 375; *Virgin v. Brubaker*, 4 Nev. 31. In North Carolina the wife need not now, by statute, join in such a mortgage. Code of 1883, §1272.

⁴ *Moring v. Dickerson*, 85 N. C. 466; *Blatchford v. Boyden*, 122 Ill. 657; *Wallace v. Silsby*, 13 Vroom, 1; *Curtis v. Root*, 20 Ill. 53; *Bunting v. Jones*, 78 N. C. 242; *Baker v. Clepper*, 26 Tex. 629.

⁵ *Tibbetts v. Langley*, 12 S. Car. 465; *Houston v. Houston*, 67 Ind. 276; *Ahern v. White*, 39 Md. 409; *Foster's Appeal*, 3 Pa. St. 79. If the

of the mortgage is not usually extended to cases where the mortgage is given to another person than the vendor to secure a loan of the money used in paying for the land; but upon this point the decisions are not uniform.¹ Where the statute does not make priority of lien, as between mortgages, dependent upon priority in registry, a purchase money mortgage, though recorded after a mortgage to another person to secure a loan of the cash used in making a part payment on the land, has been given precedence.² But where, as between conveyances, the statutes require priority in registry, a purchase money mortgage may, as any other, lose its precedence over a later conveyance by delay in recording.³ In Minnesota it is held that the pur-

two instruments be delivered at the same time, it does not matter that they were executed on different days. *Banning v. Edes*, 6 Minn. 402; *Cake's Appeal*, 23 Pa. St. 186; *Summers v. Darne*, 31 Gratt. 791; *Stewart v. Smith*, 36 Minn. 82; s. c. 30 N. W. Repr. 430.

¹ *Bank v. Ackerman*, 70 Tex. 429. 433; s. c. 8 S. W. Repr. 451; *Henissler v. Nickum*, 38 Md. 270; *Stansell v. Roberts*, 13 Ohio, 148; *Calmes v. McCracken*, 8 S. Car. 87; *Turk v. Funk*, 68 Mo. 18; s. c. 30 Am. Rep. 771. In Texas it is held that the execution, at the time of the deed, of a purchase money mortgage back, renders the contract executory, and leaves the paramount title in the vendor. *Wright v. Wooters*, 46 Tex. 381.

² *Rogers v. Tucker*, 94 Mo. 346; s. c. 7 S. W. Repr. 414; *Turk v. Funk*, 68 Mo. 18; s. c. 30 Am. Rep. 771; *City Nat. Bank's Appeal*, 91 Pa. St. 163.

³ Where two mortgages were delivered and filed for record at the same time, each taken without notice of the other, it was held immaterial which was executed first, and that one of them was for purchase money due on the premises. *Koevenig v. Schmitz*, 71 Iowa, 175; s. c. 32 N. W. Repr. 320.

If the vendor neglects to take a mortgage until after the execution of a mortgage to a third person, without notice, the purchase money mortgage will be subject to the prior one. *Houston v. Houston*, 67 Ind. 276.

In New Jersey, where a second mortgage was recorded ahead of the purchase money mortgage, the one first recorded was denied priority on the ground that the deed to the mortgagor was not then of record. *Boyd v. Mundorf*, 30 N. J. Eq. 545.

In Louisiana a judgment lien existing against the vendee, will attach against the land, unless the purchase money mortgage be "seasonably recorded." *Givanovitch v. Hebrew Congregation*, 36 La. Ann. 272.

In Illinois the record of a purchase money mortgage, void because not acknowledged by a married woman who was the purchaser, was held to charge a subsequent purchaser from her with constructive no-

chase money mortgage may be executed to a third party who advances the purchase money, and that it takes precedence of the lien of a prior judgment against the mortgagor, and need not have been executed at the same moment, nor on the same day, with the deed of purchase, provided the execution of the two instruments constituted part of one continuous transaction, and was so intended, so that both should in equity be given a contemporaneous operation in order to promote the intention of the parties.¹

§173. Re-inscription of Mortgages.

In Louisiana the statute requires mortgages to be re-inscribed every ten years in substantially the same manner as the original inscription.² This is done in order to dispense with the necessity of examining the records for more than ten years back.³ It is required of legal as well as conventional mortgages, but not of minors' mortgages.⁴ A mere recital of the original indebtedness is not sufficient; nor will a recital in another mortgage that a prior mortgage on the same property had been re-inscribed, operate as a re-inscription.⁵ The re-inscription must be made within ten years; if made after that time it is of no effect as to

tice of the vendor's equities. *Morrison v. Brown*, 83 Ill. 564. That the record of a purchase money mortgage, if seen, gives notice that the mortgagor has, or is entitled to a deed. See *Clark v. Holland*, 72 Iowa, 34; s. c. 33 N. W. Repr. 350.

¹ *Stewart v. Smith*, 36 Minn. 82; s. c. 30 N. W. Repr. 430.

² Civ. Code. §3369; *Tilden v. Morrison*, 33 La. Ann. 1067; *Villavaso v. Walker*, 28 La. Ann. 775; *Bondurant v. Watson*, 103 U. S. (13 Otto), 281. When a mortgage is not re-inscribed, a creditor or party interested has the right to demand its cancellation by the recorder. *Britton v. Norment*, 20 La. Ann. 486.

³ *Bondurant v. Watson*, 20 La. Ann. 385; *Patterson v. De La Ronde*, 8 Wall. 292.

⁴ *Succession of Gale*, 30 La. Ann. 351; *Cucullu v. Hernandez*, 103 U. S. 105; *Souvinet v. Landreaux*, 1 La. Ann. 219.

⁵ *Britton v. Janney*, 21 La. Ann. 204; *Villavaso v. Walker*, *supra*; *Shepherd v. Orleans*, 2 La. Ann. 100; *Pontz v. Reggio*, 35 *Id.* 637. Nor will the pendency of suit for the debt save re-inscription. *De St. Romes v. Blanc*, 31 La. Ann. 48; *Barelle v. Delassus*, 16 *Id.* 280; *Watson v. Bondurant*, 30 *Id.* 2. Nor even the record of a judgment on the note. *Mittenberger v. Drebroca*, 33 *Id.* 313.

third parties.¹ The ten years are reckoned, as between the parties, from the date of the mortgage; and as to third parties from the date of its record.² Where a subsequent purchaser assumes a prior mortgage, its re-inscription has been held not necessary as to him.³

§174. Assignment of Mortgages.

The recording of assignments of mortgages has been already considered.⁴ Such assignments are void, if unrecorded, as against subsequent purchasers whose interests are affected thereby, provided assignments are embraced by the recording acts of the particular jurisdiction;⁵ but unless expressly embraced within the terms of the statute, it has usually been held that their record is not constructive

¹ Adams v. Daunis, 29 La. Ann. 315; Sorrells v. Stamper, 27 La. Ann. 630. In Gordon v. Knox, 31 La. Ann. 284, it is said that re-inscription after the ten years preserves the lien as between the parties; and in Cucullu v. Hernandez, *supra*; Bondurant v. Watson, 103 U. S. 281; and Shields v. Shiff, 124 U. S. 351, it is said that as between the parties, and as to parties with actual notice, the mortgage is good without either inscription or re-inscription; but in Tilden v. Morrison, 33 La. Ann. 1067, it is held that without inscription within ten years, and re-inscription, the mortgage ceases even as between the parties; and in numerous cases that actual notice is of no avail in that state. Payne v. Pavey, 29 La. Ann. 116; Adams v. Daunis, *Id.* 316; Civ. Code, §3342; Rocheraux v. Delacroix, 26 *Id.* 584; Tulane v. Levison, 2 *Id.* 787; Harang v. Plattsmier, 21 *Id.* 426; Derbes v. Romero, 32 *Id.* 283.

² Batey v. Woolfolk, 20 La. Ann. 385. An artificer's privilege, recorded after the statutory period of ten days, will not affect even posterior parties after its record. Jenkins v. Nelson, 11 Mart. 437.

³ Scionneaux v. Wagnespach, 32 La. Ann. 283; Batey v. Woolfolk, 20 *Id.* 385. See Tilden v. Morrison, *supra*.

Where a new mortgage is given on the same property to secure the same debt for which a prior mortgage had been given, re-inscription of the old mortgage is unnecessary as against creditors whose liens accrue subsequent to the record of the new mortgage. Hart v. Caffery, 39 La. Ann. 894; s. c. 2 South. Repr. 788.

⁴ *Ante*, §33; and see *post*, §209.

⁵ McCormick v. Bauer, 122 Ill. 573; s. c. 13 N. E. Repr. 852; 11 West. Repr. 744; The Conn. Co. v. Talbot, 113 Ind. 373; s. c. 3 Am. St. Rep. 655; 14 N. E. Repr. 586; Reeves v. Hayes, 95 Ind. 521; Bacon v. Schoonhoven, 87 N. Y. 446; Decker v. Boice, 83 N. Y. 215; Swartz v. Leist, 13 O. St. 419; Purdy v. Huntington, 46 Barb. 389; s. c. 1 Am. St. Rep. 532.

notice.¹ A statute providing for the record of assignments of "any mortgage of record," has been held operative as to assignments already then made, and prospective to the extent of requiring their record as against subsequent purchasers and incumbrancers.² Where G., the assignee of a mortgage made to W., neglected to record the assignment, a recital in a subsequent deed, made by the administrator of the mortgagor to H., that it was made subject to a debt of \$1,000.00 due to G., was held not to charge a purchaser of the property from H. with notice of the mortgage to W.³ But as already stated, the assignee of a mortgage is not usually held bound to record the assignment as against the mortgagor;⁴ such record is for his protection against a subsequent transfer of the mortgage by the mortgagee, or its release by him.⁵ Under statutes providing for separate record books, recording an assignment of a mortgage in the record book of deeds is usually held of no avail.⁶ As the

¹ *Dixon v. Hunter*, 57 Ind. 278; *Gordon v. Rixley*, 76 Va. 694; *Haselman v. McKernan*, 50 Ind. 441; *Oregon Trust Co. v. Shaw*, 5 Saw. 336. In the absence of any legislative direction to that effect, there does not seem to be any obligation resting upon an assignee to record his assignment to protect himself against any subsequent purchaser or mortgagee. Such assignment is not the conveyance of an "interest or estate in lands." *Watson v. Dundee Co.*, 12 Or. 471; s. c. 8 Pac. Repr. 548. *Contra*, *Pepper's Appeal*, 77 Pa. St. 373; *Neide v. Pennypacker*, 9 Phila. 86. See *post*, §209.

² *The Conn. Co. v. Talbot*, 113 Ind. 373 (s. c. 3 Am. St. Rep. 655); citing *People v. Spicer*, 99 N. Y. 225; *Larkins v. Saffarans*, 15 Fed. Repr. 147; *Excelsior Co. v. Keyser*, 62 Miss. 155; *Baldwin v. City of Newark*, 38 N. J. 158; *People v. Clark*, 7 N. Y. 385; *Boston v. Cummings*, 16 Ga. 102; *Jackson v. Lamphire*, 3 Pet. 280.

³ *Brownback v. Ozias*, 117 Pa. St. 87, 92; s. c. 11 Atl. Repr. 30; 9 Cent. Repr. 554. "At best," said Judge Green, rendering the opinion, "this sort of notice is but constructive notice, and it is quite enough to hold a purchaser bound by that which does appear in the record, without subjecting him to responsibility by construction for that which does not appear there. * * * G. having failed to record his assignment between him and O. (the purchaser of the property), there was no equality of innocence."

⁴ *Ante*, §33; *Mott v. Clark*, 9 Pa. St. 399; s. c. 49 Am. Dec. 566.

⁵ *Henderson v. Pilgrim*, 22 Tex. 464; *Penn. Salt Co. v. Neel*, 54 Pa. St. 19; *ante*, §33; *Ladd v. Campbell*, 56 Vt. 529.

⁶ *Purdy v. Huntington*, 42 N. Y. 343; s. c. 1 Am. St. Rep. 532; *Edwards v. Trumbull*, 50 Pa. St. 509; *Shaw v. Wiltshire*, 65 Me. 485.

A. conveyed to B., who gave back a purchase money mortgage which

transfer of a note carries with it as an incident of the debt a mortgage given as security therefor, a *bona fide* assignee of the mortgage must also be ordinarily a purchaser of the note in good faith.¹

§175. Cancellation, Release and Discharge of Mortgages.

The general and statutory features of this subject have been already stated.² A mortgage release executed by one who appears by the records to be the owner of the mortgage, will protect a subsequent purchaser of the property:³ but where the mortgage appears to have been discharged by an attorney, clerk or some other person than the mortgagee, this has usually been held sufficient to excite inquiry as to the unusual circumstance.⁴ Actual notice of a release, or of such payment or agreement as gives a right thereto, is binding on a subsequent purchaser of the mortgage.⁵ So, one with knowledge that a release was procured

was duly recorded. This mortgage, and the notes secured by it, were assigned by A. to C., but the assignment was not recorded for some years. Meanwhile, B. quit-claimed the land back to A. Held, that no merger took place as against the rights of C.; nor were his rights affected, except as to third parties buying from A. prior to the record of the assignment. *The Int. Bank v. Wilshire*, 103 Ill. 143, 149; approved in *McCormick v. Bauer*, 122 Ill. 573; s. c. 13 N. E. Repr. 852; 11 West. Repr. 744.

¹ Where a mortgage was bought for a small consideration, the non-production of the note, and the fact that it was long overdue, held to charge the purchaser with notice that it had been transferred. *Potter v. Strausky*, 48 Wis. 235.

² *Ante*, §34. The recorder's certificate of the cancellation of a mortgage is *prima facie*, but not conclusive, evidence of that fact. *Lafarge v. Morgan*, 11 Mart. (La.), 462.

³ *Blunt v. Norris*, 123 Mass. 55. As by an administratrix of the former mortgagee. *The Conn. Co. v. Talbot*, 113 Ind. 373; s. c. 3 Am. St. Rep. 655. See *contra*, *Lee v. Clark*, in last note to this section.

⁴ *Smith v. Lowry*, 113 Ind. 37; *Harris v. Cook*, 28 N. J. Eq. 345; *Weber v. Bridgman* (N. Y.), 21 N. E. Repr. 984; *Smith v. Kidd*, 68 N. Y. 130; *Swarthout v. Curtis*, 5 N. Y. 301; *O'Neill v. Douthitt* (Kan.), 20 Pac. Repr. 493.

⁵ *Huff v. Farwell*, 67 Iowa, 298; s. c. 25 N. W. Repr. 252. It is the duty of the mortgagee to have the mortgage canceled, at his own expense, and payment may be withheld until this be done. *Walker v. Cucullu*, 15 La. Ann. 689.

by fraud, or executed through mistake, takes subject to the mortgage.¹ It is held in Louisiana that where the cancellation of a mortgage was obtained through fraud, or made by the recorder without authority, the rights of the mortgagee will be held good even against an innocent subsequent purchaser;² but elsewhere it is believed the general rule usually obtains that where the record is perfect, or clear on its face, a *bona fide* purchaser will be protected by it.³ Where the assignee of a mortgage gives a quit-claim deed of the property to a third person, this so releases his interest in the premises that he cannot afterwards discharge the mortgage.⁴ The law of record and of actual notice applies to the entry of satisfaction of a mortgage. If such entry be made through mistake, it cannot be corrected in equity as against the rights of third persons that have intervened.⁵ So,

¹ *Bacheman v. Chaperon*, 15 La. Ann. 4; *Lewis v. Ferrell*, 51 Conn. 216; *Farmer's Bank v. Butterfield*, 100 Ind. 229.

² *Horton v. Cutler*, 28 La. Ann. 331; *Mechanic's Association v. Ferguson*, 29 *Id.* 548. Where the release of the prior mortgage is forged, it will not, of course, protect a subsequent purchaser. *Keeley v. Hannah*, 52 Mich. 535; s. c. 18 N. W. Repr. 346.

³ Where the mortgagee negligently permits the mortgagor to retain the mortgage, and the latter fraudulently cancels it of record, the mortgagee cannot enforce it as against a *bona fide* purchaser of the property. *Heyder v. Excelsior Ass'n*, 42 N. J. Eq. 403; s. c. 59 Am. Rep. 49.

Where a mortgage appears duly satisfied of record, a subsequent purchaser without actual notice of fraud or mistake in its cancellation, will be protected. *Green v. Rick*, 121 Pa. St. 130; s. c. 6 Am. St. Rep. 760; 15 Atl. Repr. 497; *Boutwell v. Steiner*, 84 Ala. 307; s. c. 5 Am. St. Rep. 375; 4 South. Repr. 184; *Frazee v. Inslee*, 2 N. J. Eq. 239; *Neidig v. Whiteford*, 29 Md. 178; *Waldron v. Sloper*, 1 Drew. 193; *Garland v. Harrison*, 17 Mo. 282; *Roberts v. Halstead*, 9 Pa. St. 32; s. c. 49 Am. Dec. 541; *Swarthout v. Curtis*, 5 N. Y. 301; s. c. 55 Am. Dec. 345.

⁴ *Conner v. Whitmore*, 52 Me. 185; and see *Reeves v. Hayes*, 95 Ind. 521. Where a judgment lien index, under the head of "satisfaction," contained, in the appropriate columns, a date and the name of the plaintiff in the judgment, this was held not to imply a satisfaction by payment, but to be sufficient to put upon inquiry as to whether it had not been satisfied by a sale of real estate of the debtor. *Mather v. Jenswold*, 72 Iowa, 550, 553; s. c. 34 N. W. Repr. 327.

Ferguson v. Glassford (Mich.), 35 N. W. Repr. 820; *Cornoly v. Fuller*, 30 Iowa, 212. But a cancellation by mistake does not give a junior existing lien preference. *Foster v. Paine*, 63 Iowa, 85; s. c. 18 N. W. Repr. 699.

where a release of a mortgage is executed by one as "attorney in fact," and there is nothing of record showing that he had authority to execute such release, it has been held insufficient.¹ Courts of equity will grant relief against the discharge of a mortgage made through fraud, or by mistake,² and will in some cases re-instate the lien even as against intervening liens of record,³ except where negligence or want of good faith can in some way be imputed to the first mortgagee.⁴

¹ O'Neill v. Douthitt (Kan.), 20 Pac. Repr. 493; Smith v. Kidd, 68 N. Y. 130.

² Geib v. Reynolds, 35 Minn. 331; s. c. 28 N. W. Repr. 923; Garwood v. Eldredge, 2 N. J. Eq. 145; s. c. 34 Am. Dec. 195; Dudley v. Bergen, 23 N. J. Eq. 397, 400; Bruce v. Bonney, 12 Gray (78 Mass.), 107; French v. De Bow, 38 Mich. 708; Cobb v. Dyer, 69 Me. 494; Sheldon v. Holmes, 58 Mich. 138; s. c. 24 N. W. Repr. 795; Hoffman v. Wilhelm, 68 Iowa, 510; s. c. 27 N. W. Repr. 483; McGiven v. Wheelock, 7 Barb. 22; Liggett v. Himle, 38 Minn. 421; s. c. 38 N. W. Repr. 201.

³ Hutchinson v. Swortseller, 31 N. J. Eq. 205; Geib v. Reynolds, 35 Minn. 331; Barnes v. Mott, 64 N. Y. 397; Hanlon v. Doherty, 109 Ind. 37; Banta v. Vreeland, 15 N. J. Eq. 103; Sidener v. Payey, 77 Ind. 241, 246; Elstor v. Castor, 101 Ind. 426, 443; s. c. 51 Am. Rep. 754; Cobb v. Dyer, 69 Me. 495; Bruce v. Nelson, 35 Iowa, 157.

⁴ Childs v. Stoddard, 130 Mass. 610; Woolen v. Hillen, 9 Gill. 185; s. c. 52 Am. Dec. 690; Anglade v. St. Avit, 67 Mo. 434; Banta v. Garmo, 1 Sand. Ch. 383; Charleston v. Ryan, 22 S. Car. 339; s. c. 53 Am. Rep. 713; Peckham v. Haddock, 36 Ill. 38; Heyder v. Excelsior Ass'n, 42 N. J. Eq. 403; s. c. 59 Am. Rep. 49.

In a late Missouri case it was held, where a deed of trust was given to secure negotiable notes, which were afterwards assigned to a third party and the trust deed delivered with them, that a wrongful release of the lien and record entry of satisfaction by the trustee would not protect subsequent purchasers of the property in good faith. *Lee v. Clark*, 89 Mo. 553; s. c. 1 S.W. Repr. 142, citing *Joerdens v. Schrimpf*, 77 Mo. 383; *Boatmen's Sav. Bk. v. Grewe*, 84 Mo. 478. "To the question, what shall one desiring to purchase do under such circumstances as are disclosed by this record? the answer is, let it alone until he can ascertain who holds the note. He is under no obligation to buy, and prudence would dictate that he should not buy until satisfied that the owner of the note had entered satisfaction of the debt. It may embarrass persons desiring to purchase, and it might be well for the legislature to require a memorandum of the assignment of the note to be entered upon the margin of the deed of trust or mortgage." *Henry, J.*, in *Lee v. Clark*, *supra*. So one who purchases a mortgage without requiring the production of the note secured by it, does so at the peril of being held a purchaser in bad faith, if the note has been transferred. *Potter v. Strausky*, 48 Wis. 235. The case of *Lee v. Clark*, above, while

§176. Extent to Which the Record is Notice.

The record is notice of everything deducible from its contents as matter of law. Thus, where a mortgage secured payment of an annuity to a trustee for the benefit of a minor, and the trustee wrongfully discharged it by the entry of satisfaction in full in the margin of the record, a subsequent purchaser of the property was held chargeable with constructive notice, that the release was unauthorized and in

contrary to the decided weight of authority, is supported by a number of cases which give to a mortgage securing a negotiable debt the same protection in the hands of a *bona fide* holder as the debt itself, for the reason stated by Judge Henry, that the mortgage is treated as but an incident of the debt. See dissenting opinion in *Bank v. Anderson*, 14 Iowa, 544; *Byles v. Tome*, 39 Md. 461; *Potter v. Strausky*, 48 Wis. 235; *Lewis v. Kirk*, 28 Kan. 497. An entry of satisfaction by the mortgagee, after he had transferred the notes, held to give no preference to a second mortgage, though taken in good faith. *Reeves v. Hayes*, 95 Ind. 521, overruling *Ayers v. Hays*, 60 Ind. 452.

The record which will protect a subsequent purchaser is the record as he finds it, not as he makes it, or procures it to be made. Thus, where an unsatisfied mortgage of record was to secure a negotiable bond not due which the mortgagee assured a purchaser of the property was still in his possession, and that he would cancel it, and the purchaser, without requiring the production of the bond, or the surrender of the mortgage itself, paid the amount of the debt, and had satisfaction entered of record, it was held that because of such carelessness, he took the property subject to the mortgage, which, together with the bond, had been transferred to a third party. *Windle v. Bonebrake*, 23 Fed. Repr. 165; and to same effect, *Brayley v. Ellis*, 71 Iowa. 155; s. c. 32 N. W. Repr. 254, cited *ante*, §33, note. But where the purchaser finds the record released and satisfied by the mortgagee, and has neither actual nor record notice of the assignment of the mortgage, nor that the debt is unpaid, he may rely on the record, and will take the land free of incumbrance, although the record may have been released by fraud, accident or mistake, or merger of titles. *Windle v. Bonebrake*, *supra*; *Keohane v. Smith*, 97 Ill. 156; *Purdy v. Huntington*, 42 N. Y. 334; 1 Am. St. Rep. 532; *Bowling v. Cook*, 39 Iowa, 200, affirmed in *Brayley v. Ellis*, *supra*; *Ayers v. Hays*, 60 Ind. 452; *Ins. Co. v. Eldredge*, 102 U. S. 545; *Ogle v. Turpin*, 102 Ill. 148; *Van Keuren v. Corkins*, 66 N. Y. 77; *Etzler v. Evans*, 61 Ind. 56; *Quattlebaum v. Black*, 24 S. C. 48; and cases cited in the foregoing notes to this section.

Assignments of mortgages are usually placed by the statutes or by the courts within the recording acts, and where this is the case, if the assignee fails to record his assignment and the mortgagee discharges the mortgage of record, such assignee will not be protected against an innocent purchaser of the property. *Ladd v. Campbell*, 56 Vt. 529; *Daws v. Craig*, 62 Iowa, 515; *ante*, §§33, 174.

fraud of the trust.¹ Where a release is improperly executed, but there is nothing in the record disclosing that the action of the trustee was wrongful, a subsequent *bona fide* purchaser will take the property clear of the lien.² The fact that the debt was not due at the time of the release, as shown by the record, has been held sufficient to charge notice that the release was wrongfully executed.³ The record will charge constructive notice of fraud in the execution of the deed where there is matter on the face of the instrument indicating fraud, but not otherwise.⁴ A record that discloses the relation of attorney and client touching a levy on real estate, is notice to a subsequent purchaser from the attorney that he cannot dispute the validity of the levy and take an after-acquired title to the land.⁵ But constructive notice by registration does not necessarily imply knowledge on the part of subsequent purchasers of the relations subsisting between the parties to a recorded instrument.⁶

¹ McPherson v. Rollins, 107 N. Y. 317; s. c. 1 Am. St. Rep. 826; 14 N. E. Repr. 411; Swift v. Smith, 102 U. S. (12 Otto), 442.

² Williams v. Jackson, 107 U. S. 478. See Clark v. Watson, 141 Mass. 248; s. c. 1 N. Eng. Repr. 725; 5 N. E. Repr. 298.

³ Jackson v. Blackwood, 4 MacArth. 188, C. J. Carter dissenting.

⁴ Johnson v. Theveatt, 18 Ala. 741. The doctrine of constructive notice, said Judge Rapallo, cannot be so applied as to charge a *bona fide* purchaser with notice that his grantor made the conveyance with intent to defraud creditors at large, having no specific lien or equity. Parker v. Connor, 93 N. Y. 125; s. c. 45 Am. Rep. 184; citing Stearns v. Gage, 79 N. Y. 102, and distinguishing Baker v. Bliss, 39 N. Y. 70, which is said to be only seemingly to the contrary. See also, State v. Merritt, 70 Mo. 275; Farley v. Carpenter, 27 Hun. 359.

⁵ Briggs v. Hodgdon, 78 Me. 514; s. c. 7 Atl. Repr. 387.

Where a mortgage purported to be released by an attorney in fact, this was held to charge a subsequent purchaser with notice that the power of attorney described a different tract than that released. Hagerman v. Sutton, 91 Mo. 519; s. c. 4 S. W. Repr. 73.

⁶ Thus where A. and B. executed a joint mortgage on tracts of land owned by them in severalty, to secure their joint note, on which B. was in fact only surety for A., but this did not so appear, B. was not permitted, as against rights under a subsequent mortgage given by A., to claim that by reason of his being surety, he was entitled to pay off the first mortgage and be subrogated to all the rights of the first mortgagee for his indemnity, thereby taking precedence of the second mortgagee, who had no actual notice of his suretyship. Orvis v. Newell, 17 Conn. 97.

The trustee, a deed to whom is absolute in form, is the only person who can make a declaration of trust, the record of which will be con-

§177. Continued—Notice of Matter of Law.

Where the recital in a patent to an assignee is of a transfer which the party of himself could not have made, as of an administrator, a subsequent purchaser under the patentee is chargeable with notice of any defects in such transfer, and must look at his peril to see that the administrator had the requisite authority to assign the warrant, or land certificate.¹ The record of a trust deed or mortgage with a power of sale charges subsequent purchasers to inquire if any sale has been made under the power, for in such case, although the deed be not recorded, the equity of redemption is cut off.² Notice of a recorded instrument is notice of the covenants contained in it, and all equities and rights growing out of or incident to it; as where a recorded mortgage appeared to be barred by limitation, but was in fact extended by virtue of a new promise extending the debt.³

structive notice. *Clark v. Watson*, 141 Mass. 248; s. c. 1 N. Eng. Repr. 725; 5 N. E. Repr. 298.

¹ *Reeder v. Burr*, 4 Ohio, 446, 458; *Bonner v. Ware*, 10 *Id.* 465; *Bell v. Duncan*, 11 *Id.* 192; *Chinn v. Taylor*, 64 Tex. 385; *Renick v. Dawson*, 55 Tex. 102.

In Texas property acquired during the marriage, unless by gift, devise or descent, is by law presumed to be community property; hence, the registry of a deed to the wife, reciting the consideration as paid by her, but not out of her separate means, is not notice to purchasers from the husband that the property is her separate property. *Kilgore v. Graves*, 2 Civ. App. (Tex.), §410, citing *Wallace v. Campbell*, 54 Tex. 87; *Cooke v. Bremond*, 27 Tex. 457. Otherwise, if the recitals show that the consideration paid was out of her separate estate, or that the purchase was designed for her separate benefit. *Kirk v. Navigation Co.*, 49 Tex. 213. In California the fact that the deed is made to the wife is held sufficient to charge notice that the property may be her separate property. *McComb v. Spangler*, 71 Cal. 419; s. c. 12 Pac. Repr. 347; *Ramsdell v. Fuller*, 28 Cal. 38.

² *Heaton v. Prather*, 84 Ill. 330, citing *Farrar v. Payne*, 73 Ill. 82.

The record of a deed from the purchaser at an invalid tax sale is not notice to the comptroller of the right of the grantee to have the purchase money refunded to him. *The People v. Chapin*, 104 N. Y. 96; s. c. 10 N. E. Repr. 141.

³ *Plant v. Shryock*, 62 Miss. 821; *Smith v. Lowry*, 113 Ind. 37; N. Y. Life Ins. Co. v. Covert, 6 Abb. N. S. 154; *Phillips v. South Park Bk.*, 119 Ill. 626; s. c. 10 N. E. Repr. 230; *McAdow v. Black*, 6 Mont. 601; s. c. 13 Pac. Repr. 377.

The purchaser who buys subject to a recorded deed, takes subject to whatever covenants run with the land. *Schwallback v. Chicago*, 69 Wis.

But the recital in a deed to A. that it was made in pursuance of a contract with X., of whose right A. was assignee, has been held not constructive notice to a subsequent purchaser from A. that by that contract a lien or equity had been retained by the grantor of A.¹ Registration will not operate as constructive notice of a provision in a duly recorded instrument, having relation to a matter the record of which is not authorized by law; as where a mortgage by one partner to another contained also a limitation on the power of the mortgagor as a partner.²

§178. Recitals Charge Constructive Notice, When.

As to matters of fact recited or alluded to in the record, and as to other instruments referred to therein, it may be stated as a general rule that if there is sufficient contained in the record to reasonably induce an inquiry in the mind of an intelligent person, it will charge notice of the facts so contained, and of all facts which an inquiry suggested by such information diligently prosecuted would have disclosed.³ In many instances the constructive notice imparted by the record is in the same transaction blended

392; s. c. 34 N. W. Repr. 128. But the record is not notice of matter of estoppel *in pais*. Hager v. Spect, 52 Cal. 579.

¹ Acer v. Wescott, 46 N. Y. 384; s. c. 7 Am. Rep. 355, citing Ware v. Egmont, 31 Eng. L. & Eq. 89; Hiern v. Mill, 13 Ves. 120.

The recital must, in order to necessitate further inquiry, indicate the defect in some way that will excite attention and arouse suspicion. Morse v. Hunter, 1 Gilm. 317; Bell v. Duncan, 11 Ohio, 192.

² Monroe v. Hamilton, 60 Ala. 227. So the record of a conveyance of personal property is not notice of a transfer of choses in action contained therein, where the statute does not authorize the registry of such transfer. Stewart v. Kirkland, 19 Ala. 162; McCain v. Wood, 4 Ala. 258; Monroe v. Hamilton, *supra*.

³ Cambridge Bank v. Delano, 48 N. Y. 326; Wilson v. Hunter, 30 Ind. 466; Leiby v. Wolf, 10 Ohio, 83; McPherson v. Rollins, 107 N. Y. 316; s. c. 1 Am. St. Rep. 826; 14 N. E. Repr. 411; De Sepulveda v. Baugh, 74 Cal. 468; s. c. 5 Am. St. Rep. 455; 16 Pac. Repr. 223; Jenkins v. Adams, 71 Tex. 1; McIlvaine v. Legare, 34 La. Ann. 923; Lodge v. Simonton, 2 Pen & Watts, 439; s. c. 23 Am. Dec. 36; Acer v. Wescott, 46 N. Y. 384; s. c. 7 Am. Rep. 355; Parker v. Conner, 93 N. Y. 118; s. c. 45 Am. Rep. 184; Littleton v. Giddings, 47 Tex. 109; 4 Kent Com. 179; Wethered v. Boon, 17 Tex. 143.

with that arising from recitals in other instruments in the same chain of title, and also with that growing out of the duty of inquiry suggested by some matter of fact entirely outside of the record. With relation to the extent to which the doctrine of imputed notice will be applied, there is no substantial difference in the underlying principle governing these several classes of constructive notice.¹ In some cases the doctrine of constructive notice has been pushed to such an extent that it has been at length declared highly inexpedient for courts of equity to extend it further.² The general rule above is illustrated by the cases in the succeeding sections and the notes below.³

§179. Notice From Unusual Recitals.

Recitals of an unusual character will ordinarily excite attention and charge notice by imposing the duty of inquiry.

¹ As to recitals in the same chain of title, see *post*, §221; and as to inquiry and actual notice, *post*, §§223, 226.

² *Brownback v. Ozias*, 117 Pa. St. 87, 92; s. c. 11 Atl. Repr. 30; 9 Cent. Repr. 554; *Ware v. Egmont*, 31 Eng. L. & Eq. 89; *Acer v. Westcott*, 46 N. Y. 384; s. c. 7 Am. Rep. 355.

³ See *Knorr v. Raymond*, 73 Ga. 749, 775; *Wolfe v. Dyer*, 95 Mo. 545; s. c. 8 S. W. Repr. 551; *Eck v. Hatcher*, 58 Mo. 235; *Brush v. Ware*, 15 Pet. 93; *Gibert v. Peteler*, 38 N. Y. 165; s. c. 97 Am. Dec. 785; *Jumel v. Jumel*, 7 Paige, 591; *Tuttle v. Jackson*, 6 Wend. 213; *Bell v. Twilight*, 18 N. H. 129; s. c. 45 Am. Dec. 367; *Leach v. Beattie*, 33 Vt. 195; *Clabaugh v. Byerly*, 7 Gill. 354; s. c. 48 Am. Dec. 575; *Baker v. Mather*, 25 Mich. 51; *Humphreys v. Newman*, 51 Me. 40; *Ogden v. Walters*, 12 Kan. 282; *McCabe v. Grey*, 20 Cal. 509; *Buchanan v. Int. Bank*, 78 Ill. 500; *Grandin v. Anderson*, 15 O. St. 286; *Martin v. Neblett*, 86 Tenn. 383; *De Sepulveda v. Baugh*, 74 Cal. 468; s. c. 5 Am. St. Rep. 455; *Hamilton v. Nutt*, 34 Conn. 501; *Anderson v. Layton*, 3 Bush, 87; *George v. Kent*, 7 Allen, 16; *White v. Foster*, 102 Mass. 375; *Dean v. Long*, 122 Ill. 447; s. c. 14 N. E. Repr. 34; *Smith v. Lowry*, 113 Ind. 316; s. c. 15 N. E. Repr. 17; *Gilchrist v. Gough*, 63 Ind. 576; s. c. 30 Am. Rep. 250; *Peck v. Conway*, 119 Mass. 546; *Poage v. Wabash Ry.*, 24 Mo. App. 199; *Delespine v. Campbell*, 52 Tex. 4.

The record is not notice of facts contradictory of the recitals, nor is a subsequent purchaser bound to dispute their correctness. Where a deed recited that the vendor had formerly given a bond for title to the land to another person, but that its conditions had never been complied with, and such other person was dead and the bond lost, this did not charge notice of a prior conveyance of the land. *Graham v. Hawkins*, 1 Tex. Un. Cas. 514; s. c. 38 Tex. 635, and see *Boyce v. Grundy*, 3 Pet. 310; *post*, §223.

Thus the recital of an inadequate consideration, especially if it be grossly disproportionate to the real value of the property, is often regarded as a cogent circumstance so loudly informing the purchaser of fraud that he will not be permitted to shelter himself behind the want of actual knowledge.¹ But inadequacy of price realized at forced sale under execution or other legal process will not, for obvious reasons, suffice to put a purchaser on inquiry.² An obvious absurdity on the face of the instrument is a matter calling for investigation and charges notice.³ Where the number of the township and range were so transposed in the deed that there was no such tract of land in the county as that described, this was held sufficient to put upon inquiry.⁴

§180. Imperfect and Ambiguous Recitals.

A recital, in order to charge notice, must be such as to explain itself by its own terms, or refer to some deed or circumstance that will lead to an explanation.⁵ The courts apply the rule in these cases that that is certain which can

¹ *Hume v. Franzen*, 73 Iowa, 25; s. c. 34 N. W. Repr. 490; *Dillon v. Shugar*, *Id.* 434; *Gaines v. Saunders* (Ark.), 7 S. W. Repr. 301; *Hoppin v. Doty*, 25 Wis. 573; *Worthy v. Caddy*, 76 N. C. 82, 86; *Eck v. Hatcher*, 58 Mo. 235; *Webb v. Burney*, 70 Tex. 322; s. c. 7 S. W. Repr. 841; *Peabody v. Fenton*, 3 Barb. Ch. 451; *Knapp v. Bailey*, 79 Me. 495; s. c. 9 Atl. Repr. 122.

² *Stockett v. Taylor*, 3 Md. Ch. 537; and see *Beadles v. Miller*, 9 Bush. 405.

³ *Merrick v. Wallace*, 19 Ill. 486.

⁴ *Partridge v. Smith*, 2 Biss. 183. This is said by Mr. Wade to be as strong a case as the rule relating to errors not misleading will support. *Wade on Notice*, §184.

Where a deed contained a recital that the grantee, B., had been in possession of the land for a certain period prior to its execution under a contract for the sale of the land, a subsequent purchaser was held chargeable with notice of B.'s equitable interest, and that it was a mortgageable interest, and bound to search for incumbrances created by B. during the entire period that he was in possession as shown by the recital. *Crane v. Turner*, 7 Hun. 357; s. c. 67 N. Y. 437.

⁵ *White v. Carpenter*, 2 Paige, 217; *Morse v. Hunter*, 1 Gilm. 317; *Bell v. Duncan*, 11 Ohio, 192.

be made certain.¹ A recital in order to charge notice must be in the course of the title under which the purchaser claims;² and if the grantor has no title of record, a recital that *his* grantor conveyed the property to him does not charge third parties with constructive notice, because they have no clue by which to follow the title.³ The entry of "satisfied," in the appropriate column of a statutory index of a judgment lien has been held not to import payment, but to be sufficient to put upon notice that real estate of the judgment debtor was sold to satisfy the judgment.⁴ Imperfect descriptions of property and statements of mortgage indebtedness, heretofore adverted to, present illustrations of deficient recitals held to charge notice.⁵

¹ Parker v. Kane, 4 Wis. 1; s. c. 65 Am. Dec. 283; Spafford v. Weston, 29 Me. 140.

² Boggs v. Varner, 6 Watts & S. 469; Mueller v. Engein, 12 Bush, 441.

³ Polk v. Cosgrove, 4 Biss. 437, 439; Mills v. Smith, 4 Biss. 442.

⁴ Mather v. Jenswold, 72 Iowa, 550, 553; s. c. 34 N. W. Repr. 327.

At the close of the description in a mortgage, the following words were enclosed in parenthesis:

(Of six hundred dollars.....said premises are subject to a former).

It was held that this was notice of a prior mortgage of that amount. Sanborn v. Robinson, 54 N. H. 239; 1 Jones on Mort., §594. So, an exception in a conveyance as follows: "Except one mortgage for \$1,200," held sufficient to charge the grantee with notice, and to put him on inquiry as to who held the mortgage. Clark v. Bullard, 66 Iowa, 747; s. c. 24 N. W. Repr. 561.

⁵ *Ante*, §§147, 171; and see as to description of property held sufficient, Briggs v. Ripley, 37 Minn. 78; s. c. 33 N. W. Repr. 120; Lewis v. Hinman, 56 Conn. 55; s. c. 13 Atl. Repr. 143; and of the debt. Seymour v. Darrow, 31 Vt. 133.

A description of a part of the land conveyed in a deed as "land, the title to which is in A. given as collateral security to pay certain notes," is sufficient notice of an unrecorded mortgage to A. Dunham v. Dey, 15 Johns. 555; s. c. 8 Am. Dec. 282; Dey v. Dunham, 2 Johns. Ch. 182.

A description in a deed bounding on land of a party by name has been held notice to the grantee in the deed that the land bounded is so owned by virtue of some proper instrument of conveyance. George v. Kent, 7 Allen, 16; Pike v. Goodnow, 12 Allen, 472.

The registry of a note reciting that "the above amount is the balance of the payment due on three boilers furnished," sufficiently gives notice of a vendor's privilege or lien retained on the boilers. Melvaine v. Legare, 34 La. Ann. 923.

A mortgage describing the property hypothecated as "*une vaste terrain a l'encoignure des rues Orleans et Bourbon*," will not be held in-

§181. Recital to Other Instruments.

Recitals in a conveyance to another written instrument will charge notice of the contents of such instrument and of the rights claimed under it, though it be unrecorded.¹ Where one bought subject to an unrecorded mortgage, referred to in his deed, he has, by virtue of a recital in such mortgage, been held chargeable with constructive notice of still another conveyance affecting the property, on the ground that having notice of the mortgage, it was his duty to examine it with the view of acquiring a knowledge of its contents.² The principle, it seems, will hold good as to any number of instruments thus successively referred to by recital.³ The recital, however, in order to charge construc-

valid for want of sufficient description at the instance of one who has not been misled thereby. *Roberts v. Bauer*, 35 La. Ann. 453; and see *Carter v. Hawkins*, 62 Tex. 393; *ante*, §147.

¹ 1 *Jones on Mort.*, §595 (citing *Reeves v. Vinacke*, 1 McCrary, 213; *Westervelt v. Wyckoff*, 32 N. J. Eq. 188; *Hull v. Sullivan*, 63 Ga. 126; *Garrett v. Puckett*, 15 Ind. 485; *George v. Kent*, 7 Allen, 16; *Howard v. Chase*, 104 Mass. 249; *Kitchell v. Mudgett*, 37 Mich. 81); *Willis v. Gay*, 48 Tex. 463; s. c. 26 Am. Rep. 328; *Poage v. Wabash*, 24 Mo. App. 199.

² *White v. Foster*, 102 Mass. 375. Inquiry becomes a duty where attention has been called to another mortgage instrument, even though the party adversely interested says the mortgage has been paid off. *Price v. McDonald*, 1 Md. 403; s. c. 54 Am. Dec. 657; citing *Vattier v. Hinde*, 7 Pet. 271; *Baynard v. Norris*, 5 Gill, 483; s. c. 46 Am. Dec. 647. See *post*, §§223-226.

³ *Bisco v. Banbury*, 1 Ch. Cas. 287; *Cambridge Bk. v. Delano*, 48 N. Y. 326; *Parke v. Neeley*, 90 Pa. St. 52; *Flynt v. Arnold*, 2 Met. 619, 625; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hope v. Liddell*, 21 Beav. 183.

Where in the deed of a purchaser under whom a party claimed land through sundry mesne conveyances, a restriction as to building thereon was imposed, but, though mentioned and referred to in several of the intermediate deeds, it was not mentioned in that of the present owner, nor in several of the next preceding mesne conveyances, and the question was whether the present owner was chargeable with notice, it was held that though he was not shown to have had actual notice, yet as the conveyances under which he claimed referred to deeds in which the restriction was contained, and these deeds were recorded, he must be taken to have had notice of the existence of such restriction in the original deeds, and of its consequences. *Gibert v. Peteler*, 38 Barb. 488, 512; 38 N. Y. 165; s. c. 97 Am. Dec. 785; 3 Wash. on Real Prop. 292.

tive notice, must refer to an instrument affecting the same land. It will not charge notice in regard to the title of any other land than that conveyed by the deed containing the recital.¹ A recital to a judgment as "entered in Record No. 11 of the records of said court, on page 381," is sufficient to charge notice of all that an examination of the judgment would disclose.² Notice of an unrecorded deed or lease is not notice of peculiar or unusual covenants therein.³

¹ Webster v. Van Steenburg, 46 Barb. 211; Boggs v. Varner, 6 Watts & S. 469. See Howard v. Halsey, 4 Sandf. 565; s. c. 8 N. Y. 271.

The record is not notice of any extrinsic agreement not referred to therein. McLanahan v. Reeside, 9 Watts, 508; s. c. 36 Am. Dec. 136.

² Singer v. Scheible, 109 Ind. 575 (s. c. 10 N. E. Repr. 616); citing Word v. Krebs, 30 Gratt. 708; Cordova v. Hood, 17 Wall. 1; Lovejoy v. Raymond, 58 Vt. 509.

Where a writing, recorded as a separate paper, refers to "the within mortgage," but does not in any way describe or identify the mortgage, the record is not notice that the writing recorded was indorsed on any particular mortgage not recorded with it, as that is an extrinsic fact not within the purview of the registry laws. Bassett v. Hathaway (Mich., 1862), 1 Am. Law. Reg. 185.

³ Wilbraham v. Livesey, 18 Beav. 206. Notice of a deed accompanied with a statement of its contents which is incorrect does not necessarily charge notice of its real contents. Jones v. Smith, 1 Hare, 43; 2 Lead. Eq. Cas. (White & Tudor), 126, 127.

For cases illustrating the extent to which recitals in title papers charge notice, see Casey v. Inloes, 1 Gill, 430; s. c. 39 Am. Dec. 658; Dean v. Long, 122 Ill. 447; s. c. 14 N. E. Repr. 34; Burwell v. Fauber, 21 Gratt. 446; Knorr v. Raymond, 73 Ga. 749, 775; Martin v. Neblett, 86 Tenn. 383; Phillips v. Porter, 3 Ark. 18; s. c. 36 Am. Dec. 448; Pringle v. Dunn, 37 Wis. 449; s. c. 19 Am. Rep. 772; Delespine v. Campbell, 52 Tex. 4; Renick v. Dawson, 55 Tex. 102; Honore v. Blackwell, 6 B. Mon. 67; s. c. 43 Am. Dec. 147; Johnston v. Gwathmey, 4 Litt. 317; s. c. 14 Am. Dec. 135; Smith v. Lowry, 113 Ind. 37; s. c. 15 N. E. Repr. 17; Gilchrist v. Gough, 63 Ind. 576; s. c. 30 Am. Rep. 250; Pruden v. Alden, 23 Pick. 184; s. c. 34 Am. Dec. 51; Deason v. Taylor, 53 Miss. 697; Corbitt v. Clenny, 52 Ala. 480; Brush v. Ware, 15 Pet. 93; Morrison v. Kelley, 22 Ill. 610; s. c. 74 Am. Dec. 169; Hamilton v. Nutt, 34 Conn. 501; Singer v. Scheible, 109 Ind. 575; s. c. 10 N. E. Repr. 616; Green v. Early, 39 Md. 223; Kerr v. Kitchen, 17 Pa. St. 433; Ætna Life Ins. Co. v. Ford, 89 Ill. 252; Wallace v. Evans, 1 Dak. Ter. 387; Cambridge Bk. v. Delano, 48 N. Y. 329, 336; Buchanan v. Balkum, 60 N. H. 406; De Sepulveda v. Baugh, 74 Cal. 468; s. c. 5 Am. St. Rep. 455; 16 Pac. Repr. 223; Campbell v. Roach, 45 Ala. 667; Weisenburg v. Truman, 58 Cal. 63; Stees v. Kranz, 32 Minn. 313.

§182. Recitals of Matter of Fact.

The recital, in a deed or other conveyance, of a fact affecting the title of the property conveyed, is notice of such fact.¹ If sufficient be stated to put a prudent man on inquiry, the law imposes the duty of investigation, and imputes to a subsequent purchaser a knowledge of all facts indicated that would have been ascertained by a fairly diligent search.² Matters of fact exist in such variety, and the allusions to them by recital are often so indefinite, that a proper application of the rule is not unfrequently a matter of difficulty, and each case must of necessity depend largely on its own circumstances.³ What is reasonable diligence in

¹ *Moore v. Bennett*, 2 Ch. Cas. 246. It is immaterial whether the fact be disclosed in the deed by description of parties, in recital or otherwise. *Bacon v. Bacon*, *Tothill*, 133; *Jones v. Smith*, 1 Hare, 43.

² *Hoy v. Bramhall*, 19 N. J. Eq. 593; s. c. 97 Am. Dec. 687; *Vredenburg v. Burnet*, 31 N. J. Eq. 227; *Gibson v. Winslow*, 46 Pa. St. 380; s. c. 84 Am. Dec. 552; *Hunt v. Duun*, 74 Ga. 120; *Claffin v. Duncan*, *Id.* 348; *Wilson v. McCullough*, 23 Pa. St. 440; s. c. 62 Am. Dec. 347; *Brinkman v. Jones*, 44 Wis. 498; *Parker v. Kane*, 4 Wis. 1; s. c. 65 Am. Dec. 283; *Maupin v. Emmons*, 47 Mo. 304; *Heaton v. Prather*, 84 Ill. 330; 4 Kent Com. 179; *Mason v. Black*, 87 Mo. 329; s. c. 3 West. Repr. 208; *Passumsic v. Nat. Bank*, 53 Vt. 82; *Littleton v. Giddings*, 47 Tex. 109; *Russell v. Petree*, 10 B. Mon. 184; *Blatchley v. Osborn*, 33 Conn. 226; *Cambridge Bk. v. Delano*, 48 N. Y. 326; *Nute v. Nute*, 41 N. H. 60.

³ *Wethered v. Boon*, 17 Tex. 143. Where M. and other heirs of W. made a partition of the lands of W., which, through misapprehension of the law of heirship, gave to M. less than she was entitled to, she was held estopped to afterwards claim a greater interest in the lands divided, as against purchasers thereof from the other parties to the partition; and a recital in the deed under which such purchasers claimed, to the effect that the lands had been inherited from W. by M. and the other heirs, did not charge them with notice of the true legal rights of M. as heir, nor of the mistake in relation thereto. *Wardlaw v. Miller*, 69 Tex. 395; s. c. 6 S. W. Repr. 292.

Where the recital was that the deed was made subject to "two mortgages for \$2,000," and there were two prior mortgages, a recorded one for \$1,500, and an unrecorded one for \$2,000, the recital was held sufficient to charge the purchaser with notice of the latter. *Hamilton v. Nutt*, 34 Conn. 501. But it has been held that a purchaser from one who has covenanted to pay all legal mortgages and incumbrances of whatever nature and description on the premises, is not put upon inquiry as to any incumbrance not of record, when there is a mortgage of record to which the covenant could properly refer. *Racouillat v. Rene*, 32 Cal. 450; 1 Jones on Mort., §594.

a given case cannot be determined by any general rule. Where a statement concerning the existence of an outstanding claim, contract or equity affecting the property, also states that such contract has been rescinded, or such claim or equity has been abandoned or discharged and no longer exists, the purchaser, it seems, may rely on the whole statement if it emanates from a third person having no interest in the matter;¹ but where a recital or statement of this kind is made by the grantor or mortgagor, the weight of authority is that the purchaser is not warranted in relying on the explanation or contradiction of the liability, and is put upon inquiry.²

In those states where the law recognizes both community and separate property of the husband and wife, the legal presumption obtains that property conveyed to either spouse during the existence of the marital relation is community property, unless there are recitals in the deed declaring, or in some way reasonably indicating, that it is the

¹ 2 Pom. Eq. Jur., §601, citing *In re Bright's Trusts*, 21 Beav. 430; *Buttrick v. Holden*, 13 Met. 355, 357; *Curtis v. Blair*, 4 Cush. (Miss.), 309, 328; *Rogers v. Wiley*, 14 Ill. 65 (s. c. 56 Am. Dec. 491); *Williamson v. Brown*, 15 N. Y. 354, 360; 2 Lead. Eq. Cas. (White & T.), 158.

In *Pringle v. Dunn*, 37 Wis. 449, 465; s. c. 19 Am. Rep. 772, one purchaser "had heard that there was a defective railroad mortgage on the premises, but did not look for it because his abstract did not show it;" and another "knew by report" that there was such a mortgage, etc. Both were held charged with notice; but it does not appear in the case from whom the purchasers obtained the information.

² *Price v. McDonald*, 1 Md. 403; s. c. 54 Am. Dec. 657; *Vattier v. Hinde*, 7 Pet. 271; *Baynard v. Norris*, 5 Gill, 483; s. c. 46 Am. Dec. 647; *Hudson v. Warner*, 2 Har. & Gill, 415; 2 Lead. Eq. Cas. (White & Tudor), 159; *Dart on Vendors*, 786, ch. 15, §5; *Bunting v. Ricks*, 2 Dev. & Bat. Eq. 130; *Russell v. Petree*, 10 B. Mon. 184; *Haines v. Haines*, (Mich.), 37 N. W. Repr. 563; *Littleton v. Giddings*, 47 Tex. 109.

The rule, however, is not uniformly applied. Thus, where the recital was that a prior bond for title had been given before the issuance of patent, for services to be performed in locating the land, and that such services were not performed, but that the obligee in the bond was dead; and the bond lost, this was held not to charge notice of a prior conveyance of the land. *Graham v. Hawkins*, 38 Tex. 635; s. c. on second appeal, 1 Tex. Un. Cas. 514. See also *Jones v. Smith*, 1 Hare, 43; *Rogers v. Jones*, 8 N. H. 264; *Curtis v. Blair*, 4 Cush. (Miss.), 309, 328; *Ponder v. Scott*, 44 Ala. 241; 2 Pom. Eq. Jur., §601.

separate property of the one to whom it is conveyed.¹ Frequent illustrations of the sufficiency of recitals to charge notice of separate property rights arise in this connection.² Thus, a deed to a married woman and her husband, reciting that it is made in consideration that the heirs and legal representatives of B. (whose widow the *feme* grantee is), have withdrawn all claim in and to a certain survey of land on which B. had located a land certificate, has been held sufficient to put prudent persons on inquiry, and to charge them with notice that the *feme* grantee's interest in her separate right constituted the consideration of the deed.³

§183. Quit-Claim Deed as Charging With Notice.

The statutes of a number of the states provide that a deed of quit-claim and release shall pass all the estate that could be lawfully conveyed by deed of bargain and sale;⁴ and under the operation of these statutes, a purchaser by quit-claim deed is usually accorded the full protection of the registry laws as against an outstanding title or equity of

¹ *Ante*, §114; *Wren v. Peel*, 64 Tex. 374; *Schuyler v. Broughton*, 70 Cal. 282; *Epperson v. Jones*, 65 Tex. 425; *Moore v. Jones*, 63 Cal. 12; *Love v. Robertson*, 7 Tex. 20; s. c. 56 Am. Dec. 41; *Meyer v. Kinzer*, 12 Cal. 252; s. c. 73 Am. Dec. 538; *Alverson v. Jones*, 10 Cal. 9; s. c. 70 Am. Dec. 689; *Osborn v. Osborn*, 62 Tex. 495; *Peck v. Vandenburg*, 30 Cal. 11; *Higgins v. Johnson*, 20 Tex. 393; s. c. 70 Am. Dec. 394; *Huston v. Curl*, 8 Tex. 239; s. c. 58 Am. Dec. 110.

² *Heidenheimer v. McKeen*, 63 Tex. 229; *Zimpleman v. Robb*, 53 Tex. 274; *Kirk v. Navigation Co.*, 49 Tex. 215.

³ *Montgomery v. Noyes* (Tex.), 11 S. W. Repr. 138. In California it is held that as to purchasers of the property from the husband, the record of a deed conveying it to the wife, for a money consideration, is sufficient to put them on notice that it may be her separate property, notwithstanding the presumption that it is community property. *McComb v. Spangler*, 71 Cal. 419, 427; s. c. 12 Pac. Repr. 347; *Ramsdell v. Fuller*, 28 Cal. 38.

⁴ Rev. Stats. Wis. (1878), §2207; Rev. Code Miss. (1880), §1195; Rev. Stats. Ind. (1881), §2924; Pub. Stats. Mass. (1882), ch. 120, §2; Gen. Stats. Minn. (1878), ch. 40, §4; How. Stats. Mich. (1882), §5653; Rev. Stats. Me. (1883), ch. 73, §14; Dig. Fla. (1882), ch. 32, §4; Hill's Ann. Laws of Or. (1887), §3004.

which he had no notice.¹ Aside from these statutes, it is held in a few states that a quit-claim deed does not deprive him who claims under it of the character of a *bona fide* purchaser; and that as to the effect of the recording acts, there is no distinction between different forms of conveyance.² The weight of authority, however, is that one holding title under such a deed is not to be regarded as a *bona fide* purchaser without notice of equities held by others.³ He assumes the risk of title, and takes only what his vendor can lawfully convey; and is not regarded as a purchaser without notice entitled to the benefits of the registration acts, even though he be a purchaser for value and without

¹ Cutler v. James, 64 Wis. 173; s. c. 24 N. W. Repr. 824; 54 Am. Rep. 603; Snowden v. Tyler, 21 Neb. 199; s. c. 31 N. W. Repr. 661; Strong v. Lyun, 38 Minn. 315; s. c. 37 N. W. Repr. 448; Allison v. Thomas, 72 Cal. 562; s. c. 1 Am. St. Rep. 89.

This effect is not always given to such statutes. Thus the Oregon statute above (§3004), provides that a deed of quit-claim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale; and yet, on the theory that a grantor cannot lawfully convey that which he has already conveyed to another, it is held in that state that a purchaser by quit-claim takes subject to prior equities. Baker v. Woodward, 12 Or. 3; s. c. 6 Pac. Repr. 173; And see also, Snow v. Lake, 20 Fla. 656; s. c. 1 Am. St. Rep. 625; Martin v. Brown, 4 Minn. 282; De Veaux v. Foscender, 57 Mich. 579, in which latter case it was held, under the Michigan statute, Judge Cooley dissenting, that where a quit-claim followed sundry mesne conveyances to persons who were affected with notice, the grantee in the quit-claim was constructively charged with notice, and not entitled to protection.

² Graff v Middleton, 43 Cal. 341; Frey v. Clifford, 44 Cal. 335; Craig v. Zimmerman, 87 Mo. 475; s. c. 56 Am. Rep. 466; Munson v. Ensor, 94 Mo. 504; s. c. 7 S. W. Repr. 108; Chapman v. Sims, 53 Miss. 163; 1 Dev. on Deeds, §§670-673; Brown v. Banner Coal Co., 97 Ill. 214; s. c. 37 Am. Rep. 105; Mart. on Conv., §§59, 285.

³ Butler v. Barclay, 61 Iowa, 491; s. c. 25 N. W. Repr. 747; Bradley v. Cole, *Id.* 650; Johnson v. Williams, 37 Kan. 179; s. c. 1 Am. St. Rep. 243; 14 Pac. Repr. 537; Woodfolk v. Blount, 3 Hayw. 147; s. c. 9 Am. Dec. 739; McAdow v. Black, 6 Mont. 601; s. c. 13 Pac. Repr. 357; Thorn v. Newsom, 64 Tex. 161; s. c. 53 Am. Rep. 747; Shepherd v. Hunsacker, 1 Tex. Un. Cas. 578; Knapp v. Bailey, 79 Me. 164; s. c. 9 Atl. Repr. 122; 4 N. Eng. Repr. 147; Smith v. Pollard, 19 Vt. 272; Dickerson v. Colgrove, 100 U. S. 578; Pastel v. Palmer, 71 Iowa, 157; s. c. 32 N. W. Repr. 257; *ante*, §27.

actual notice.¹ An exception to the rule has in some instances been justly recognized in the case of deeds under execution and other judicial sales;² and the rule has also been limited to quit-claim deeds in the strict sense of that technical species of conveyances.³

§184. Purchaser From Heir Protected.

A purchaser from an heir for valuable consideration and without notice will be protected to the same extent against an unrecorded deed of the ancestor as though he had purchased from the ancestor himself.⁴ Titles when cast by descent are not, as between father and child, different titles, but the title when obtained by inheritance, if the legal title, is the apparent equitable title upon which all persons may rely in the absence of notice against all outstanding legal titles and equities subject to the registration laws.⁵ The death of the ancestor casts the apparent title on the heir, and a purchaser may deal with him as he would with the

¹ In Kansas, where the general rule obtains, a purchaser by quit-claim in possession has been protected against a subsequent grantee by quit-claim who obtained the first record. *Trustees v. Hewitt*, 35 Kan. 59; s. c. 37 Kan. 107; 14 Pac. Repr. 540.

² *Allison v. Thomas*, 72 Cal. 562; s. c. 1 Am. St. Rep. 89; 14 Pac. Repr. 309; *Torrence v. Shedd*, 112 Ill. 466; *Ingalls v. Newhall*, 139 Mass. 268; *Roberts v. Bourne*, 23 Me. 165; s. c. 39 Am. Dec. 614.

A quit-claim purchaser from a trustee protected, the deed of trust being with warranty. *Fargason v. Edrington*, 49 Ark. 207, 216; s. c. 4 S. W. Repr. 763.

A purchaser at a bankrupt sale acquires only a quit-claim, and held not entitled to protection. *Fletcher v. Ellison*, 1 Tex. Un. Cas. 661.

³ *Ante*, §27; *Harrison v. Boring*, 44 Tex. 255; *Dow v. Whitney* (Mass.), 16 N. E. Repr. 722; 6 N. Eng. Repr. 276.

A quit-claim made by a wife, but not stating that she was a married woman, held to convey only her dower interest. *Ely v. Wilcox*, 20 Wis. 523; s. c. 91 Am. Dec. 436.

⁴ *Voorhis v. Westervelt*, 43 N. J. Eq. 642; s. c. 3 Am. St. Rep. 315; s. c. 12 Atl. Repr. 533; *Youngblood v. Vastine*, 46 Mo. 239; *Blake v. Graham*, 6 Ohio St. 580; s. c. 67 Am. Dec. 360; *Powers v. McFarran*, 2 Serg. & R. 44; *McCulloch v. Endaly*, 3 Yerg. 346; *Kenedy v. Northrup*, 15 Ill. 158; *EHis v. Smith*, 10 Ga. 253; *ante*, §158; *Love v. Berry*, 22 Tex. 378; *Holmes v. Johns*, 56 Tex. 52; *Earle v. Fisk*, 103 Mass. 491.

⁵ *Lewis v. Cole*, 60 Tex. 341; *Taylor v. Harrison*, 47 Tex. 451; *Zim-pleman v. Robb*, 53 Tex. 274; *contra*, *Rodgers v. Burchard*, 34 Tex. 453.

ancestor. Unless this were the rule, one holding an unrecorded deed at the time of his grantor's death need never register the deed, and a *hiatus* could thus be made in the record of a title in contravention of the spirit and purpose of the registry laws, and without such occasion as could properly warrant this being done.¹ So, a purchaser from an executor or administrator will be protected for the same reason.² While the weight of authority is largely in favor of the rule so stated, it has not been universally held to prevail,³ the reasons assigned being that the words of the statute do not warrant the contrary and prevailing interpretation, and because, as the title passes by the execution and delivery of the deed, though it be not recorded, the ancestor is thereby divested of all title, so that nothing is left to descend to the heir. But by the same rule, as no title remained in the ancestor, he could have conveyed none himself to a subsequent purchaser. For the protection of an innocent purchaser, the law treats the apparent title as the real title. Where the earlier decisions denying protection to a purchaser from an heir are still followed, it is, rather than otherwise, because they have established a rule of property.⁴

¹ Voorhis v. Westervelt, *supra*; Youngblood v. Vastine, 46 Mo. 239; the latter case overruling earlier Missouri cases to the contrary; Stone v. Bartlett, 46 Me. 438; McClure v. Tallman, 30 Wis. 515.

² Stewart v. Matthews, 19 Fla. 752; Tucker v. Harris, 13 Ga. 1; Caldwell v. Head, 17 Mo. 561; Rodgers v. Burchard, 34 Tex. 453.

³ Hill v. Meaker, 24 Conn. 211; Hancock v. Beverly, 6 B. Mon. 531; Ralls v. Graham, 4 Mon. 120; McCamant v. Patterson, 39 Mo. 110; Webb v. Wilcher, 33 Ga. 565.

⁴ Harlan v. Seaton, 18 B. Mon. 312; Wade on Notice, §221.

A quit-claim deed from the heirs held not good against an unrecorded deed of the ancestor, in a state where a quit-claim deed from the ancestor himself would have conveyed title against his prior deed. Hastings v. Nissen (Neb.), 31 Fed. Repr. 597.

A purchaser from the heirs of a decedent takes the incumbrances with the title; and no circuitry of conveyance, no collusion or management among the holders of the interests will free the land from this burden or clothe such conveyance with the immunities attending a sale made under order of court. Piatt v. St. Clair, 7 Ohio, 165.

In Louisiana the deed of a sole instituted heir gives no title even to a *bona fide* purchaser, as against the real and paramount heir. Gaines v. New Orleans, 6 Wall. 642; Ripoll v. Morena, 12 Rob. 560.

§185. Registry of Wife's Separate Property.

In a number of the states provision is made by statute for a registration of the separate property of the wife.¹ The design of this record is to give notice that the property specified is the wife's separate property rather than to show the transfer or derivation of the title. The purpose of these statutes is the protection of creditors, and the exemption of the wife's property from the debts of the husband and the community debts of the marital partnership. Where the husband is liable for the family debts, including those for the support of the wife herself, while her own property is not so liable, it is peculiarly appropriate that this requirement of registry should be made a condition to this exemption in her favor; the more so as her property is usually in the actual control and apparent ownership of the husband. The penalty which under the general law of record usually attaches to any failure to register title, is that the property is thereby subjected to liability to the claims of purchasers and creditors of the apparent owner; and as to community debts, the equities of creditors would seem to be stronger against the wife who failed to register as required by statute, than against the grantee in an unrecorded deed. The statutes do not usually, however, expressly declare what shall be the consequence or penalty of a failure to register separate property as required. In several instances it is declared that such record shall be *prima facie* evidence of the wife's title;² and in others that it shall be conclusive against creditors and purchasers of the husband;³ and in a few that a failure of the

¹ Mansfield's Dig. of Ark., §4634; Comp. Laws of Nev. (1873), §153; Laws of Idaho, 1874-5, p. 637, §3; Gen. Laws of Mont., §866; Dig. of Fla. (1881), ch. 150, §8; Comp. Laws of Ariz., §1969; Rev. Stats. of Tex., §4634.

In some states the statute relates only to personal property. Hittel's Cal. Codes, §5165; Misc. Laws of Oregon, ch. 35, §2; Civ. Code Dak., §82.

² In Arkansas, Cal., Oregon and Dakota; see note, *supra*.

³ Stats. of Florida and Texas, *supra*.

wife to comply with the act shall confer no rights on the husband, though such failure be also declared *prima facie* evidence in favor of creditors and purchasers of the husband.¹ Where the statute provided that the wife's property so registered should be exempt from the debts of the husband, and that she should be deemed to have waived such exemption as to all property not so registered, it was held competent for the legislature to thus give full effect to the presumption that such property, even though the title to it were taken in the name of the wife, was community property, unless she gave the public notice of her separate title.² In Texas, however, it has been held that the legislature had no such power, although the constitution of the state expressly directed that laws should be passed providing for the registry of the wife's separate property, and also more clearly defining the rights of the wife as well to her separate property as to that held in common with her husband. The court ingeniously construed this to be intended only to confer additional privileges on the wife, but not that she should be subjected to any penalty or liability. However equitable it may be that the wife's property should be exempt from community debts contracted for the support of herself and children, this decision, as a construction of legislative power over the subject of registration, must be regarded as *sui generis*, and as a clear demonstration of the potency of woman in our modern jurisprudence.

¹ In Nevada, Arkansas and Florida.

² *Lemon v. Waterman*, 2 Wash. Ter. 485; s. c. 7 Pac. Repr. 899; Act of 1854, §3.

Edrington v. Mayfield, 5 Tex. 363. Since this decision the Texas act providing for a separate registry has been of no practical consequence whatever, and has received no other attention than an occasional affirmation of the earlier decisions. *Le Gierse v. Moore*, 59 Tex. 470; *Braden v. Gose*, 57 Tex. 37.

The record of a deed to the wife, as her separate property, held a sufficient compliance with the statute. *Montana Imp. Co. v. Coulter*, 7 Mont. 541; 19 Pac. Repr. 216. So, by statute in Arkansas, the record of such conveyance or a will, serves the purpose of the law.

§186. Record of Conveyances by the Wife.

The record of a married woman's deed as affected by the matter of her acknowledgment has been already considered. Where the husband is required to join in conveyances by the wife, the recording of her deed without his acknowledgment is insufficient.¹ His acknowledgment, however, need not be taken at the same time and place with that of the wife.² A subsequent purchaser in good faith and without actual notice is not affected with notice by the record of a deed fraudulently executed by a married woman under her maiden name.³ In a few states it is held that under the terms of their statutes the title of the wife does not pass until there is a compliance with all the requirements of the statute, including recordation as to both husband and wife.⁴ Construing one of these statutes, the Supreme Court of the United States, affirming a similar rule by the court of Virginia, decided that the acknowledgment by the husband, after the death of the wife, of a deed duly executed and delivered by her, was unavailing; and it is intimated that had the deed been fully executed and delivered by both husband and wife, its record after her death would be unauthorized, as the authority for recordation "at a time subsequent to the execution and delivery of the deed, seems to rest solely upon the presumption of the wife's continued acquiescence."⁵ So, it was once in-

¹ *Ludlow v. O'Neil*, 29 Ohio St. 181; *Southerland v. Hunter*, 93 N. C. 310; *Sewall v. Haymaker*, 127 U. S. 719; s. c. 8 Sup. Ct. Repr. 1348. In Maine the husband may sufficiently express his assent to the wife's deed under his hand and seal, without being in any other way a formal party thereto. *Bray v. Clapp*, 80 Me. 277; s. c. 6 Am. St. Rep. 197; and see also, *Evans v. Summerlin*, 19 Fla. 855; *Warner v. Peck*, 11 R. I. 431; *Fredenwold v. Mullen*, 10 Heisk. 226.

² *Williams v. Robson*, 6 Ohio St. 510; *Newell v. Anderson*, 7 Ohio St. 12. The assent of the husband, acting as the wife's agent in selling, is not a sufficient joinder in her deed. *Gregg v. Owens*, 37 Minn. 61; s. c. 33 N. W. Repr. 216.

³ *Draude v. Rohrer*, 9 Mo. App. 249; and see *Ely v. Wilcox*, 20 Wis. 523; s. c. 91 Am. Dec. 436.

⁴ *Rohrer v. Roanoke Bank*, 83 Va. 589; s. c. 4 S. E. Repr. 720, 731. *Pickens v. Knisely*, 29 W. Va. 1; s. c. 6 Am. St. Rep. 622.

⁵ *Sewall v. Haymaker*, 127 U. S. 719; s. c. 8 Sup. Ct. Repr. 1348.

timated in a case where the notary had by oversight omitted to attach his seal to the certificate of acknowledgment, and the deed was returned to him to have the seal attached, that it devolved on him to ascertain from the wife that she still at that time did not wish to retract.¹ To these legal curiosities may be added another case wherein it is held that the deed of a woman made while *sole* cannot be recorded after her marriage without separate acknowledgment.² In South Carolina, although the statute provides that a renunciation of dower by the wife "shall not be complete and legal until the same shall be recorded," yet a recording after the wife's death has been held good.³ The record of a deed of community property made by the wife alone under such circumstances of abandonment as authorizes her to convey, charges with constructive notice a subsequent purchaser from the husband, although the title to the land stands of record in the name of the husband alone.⁴

¹ McKellar v. Peck, 39 Tex. 381, 387.

² Johnson v. Walton, 1 Sneed, 258.

³ Campbell v. Moon, 16 S. Car. 107; Fowke v. Woodward, Speer's Eq. 233; Gibbs v. Cobb, 7 Rich. Eq. 54; Kottman v. Ayer, 1 Strobb. 552, overruling Hillegas v. Hartly, 1 Hill's Ch. 106.

⁴ Zimpleman v. Robb, 53 Tex. 274. The wife's title to such property is equal to the husband's, and while the law under ordinary circumstances gives the husband the control of it, yet under certain other circumstances it gives the wife the power of disposition; and hence, it is said, the ruling must obtain, although it breaks in upon the symmetry of the registration law as relating to the chain of recorded title by a connected sequence of names. *Id.*

In Arkansas, since the constitution of 1874, a wife's deed will convey title without acknowledgment, although acknowledgment with privy examination is still requisite for the purposes of record. Criscoe v. Hambrick, 47 Ark. 235; s. C. 1 S. W. Repr. 150; McGehee v. McKenzie, 43 Ark. 156. If, however, the property was acquired by the wife prior to 1874, the husband has a vested interest therein which can be divested only by a conveyance made and acknowledged under the requirements of the former law. Criscoe v. Hambrick, *supra*; Stone v. Stone, 43 Ark. 160; Shryock v. Cannon, 39 Ark. 434.

In Tennessee it is held in a recent decision, with dissenting opinion, that under the Married Women's Act of that state a wife may convey her separate property by deed acknowledged without privy examination in her acknowledgment and without the joinder of her husband in the conveyance. Robertson v. Queen (Tenn.), 11 S. W. Repr. 38.

§187. Second Record Not Necessary.

Once of record always of record, may be declared a maxim of the law of registration. Records of a public nature are designed to be of a permanent character, and the law which provides them contemplates supplying their place by renewal or duplication, should this from any cause become necessary; and therefore this duty is not obligatory on the persons originally having the records made, or subsequently having an interest in the property. Therefore where a conveyance has been recorded, or duly filed, a subsequent burning or other destruction of the record will not impair any rights that may have accrued thereunder, nor affect the constructive notice afforded by such filing or recording.¹ Where the records have been destroyed, a person owning real estate affected by the record, or having an interest therein, may, if he sees proper, again record his title papers, or restore the record in any manner provided by law in such cases, but he is under no legal obligation to do so.² Where the record has been destroyed, if the conveyance itself has been preserved, the recorder's certificate thereon of its having been recorded is *prima facie* sufficient evidence of that fact.³ So, proof of loss or destruction of

¹ Fitch v. Boyer, 51 Tex. 336; Meyers v. Buchanan, 46 Miss. 397; Heaton v. Prather, 84 Ill. 330; Armentrout v. Gibbons, 30 Gratt. 632; Shannon v. Hall, 72 Ill. 354; s. c. 22 Am. Rep. 146; Houston v. Blythe, 71 Tex. 719.

² Gammon v. Hodges, 73 Ill. 140; Hyatt v. Cochran, 69 Ind. 436; Keryea v. Berry, 84 Ill. 600. As to the effect of a decree re-establishing a record under a statute, see Hunt v. Ennis, 2 Woods, 103. A statute for supplying records destroyed does not preclude the common law method of proof of the lost instrument. Cowles v. Hardin, 91 N. C. 231. As to proof where records have been burned, see Smith v. Lindsay, 89 Mo. 76; s. c. 4 West. Repr. 693; 1 S. W. Repr. 88.

³ Alvis v. Morrison, 63 Ill. 181; s. c. 14 Am. Rep. 117. So also, the index book in which the deed is described may afford evidence of the fact of record. *Id.* The officer's certificate of record on the deed cannot be contradicted by the testimony of a witness not in charge of the registry office, to the effect that no such record could be found. Edwards v. Barwise, 69 Tex. 84; s. c. 6 S. W. Repr. 677; Bullock v. Wallingford, 55 N. H. 619. That the clerk's certificate of record may be contradicted, see Johnson v. Burden, 40 Vt. 567; s. c. 94 Am. Dec. 436.

both the record and the instrument, with slight circumstances in regard to the recording, have been held to sustain a presumption that the deed was duly filed or recorded.¹

If a conveyance be properly recorded, a subsequent change of county by subdivision or otherwise, which places the land in a new or different county, will not necessitate another record of the instrument in such new county.² If a county line has been once legally established, and a deed duly recorded with relation to it, a subsequent re-survey and consequent change of the line will not invalidate the record already made.³

§188. Registry as Affected by Usage.

Registration being a statutory matter and very largely a matter of arbitrary and specific regulation, the force of usage can have but little effect in its operation. Yet the courts have recognized it in some instances as giving sanction to a particular method or form, and in a few exceptional cases, as affording an authority not specifically given in the statute. Thus, in New York and North Carolina proof of record by witnesses in lieu of acknowledgment, has been held authorized by long usage or common law sanction, no statute specifying such authentication as suf-

¹ *Harrison v. McMurry* (Tex.), 8 S. W. Repr. 612; *Alston v. Alston*, 4 S. Car. 116; *Heacock v. Lubuke*, 107 Ill. 396; *Steel v. Boone*, 75 Ill. 457. In Ohio, the recorder's certificate is by statute conclusive evidence of the fact of record. Rev. Stats., §4143.

² *McKissick v. Colquhoun*, 18 Tex. 148; *Milton v. Turner*, 38 Tex. 81; *Stebbins v. Duncan*, 108 U. S. 32; *Parish Bd. v. Edrington* (La.), 8 So. Repr. 574; *Gaston v. Merriam*, 33 Minn. 275; s. c. 22 N. W. Repr. 614; *Koerper v. St. Paul Ry.* (Minn.), 41 N. W. Repr. 656.

Where the land at the date of the deed lies in one county, but at the time it is presented for record a new county has been formed out of the old one, which includes the land described in the deed, the conveyance is to be recorded in the new county, and not in the old. *Garrison v. Hayden*, 1 J. J. Marsh. 222; s. c. 19 Am. Dec. 70; *Astor v. Wells*, 4 Wheat. 466; *Stewart v. McSweeney*, 14 Wis. 492.

³ *Jones v. Powers*, 65 Tex. 207. But where the county lines have never been legally established, one must record at his peril as to the proper place. *Adams v. Hayden*, 60 Tex. 223.

ficient for registration.¹ So, in Pennsylvania, the usage of acknowledging deeds before magistrates is a common law of the state, supplying the omission of the statutes;² and where, under an early statute requiring deeds to be acknowledged before a justice of the peace of the county where the lands lay, it had long been the established practice before the year 1755 to acknowledge them before a justice of the Supreme Court of the province of Pennsylvania, such practice was taken as a correct exposition of the law.³ A recording statute required mortgages of realty and personalty to be recorded in separate books. Where the same instrument embraced both species of property, it was the usage of the office to record it only in the book of mortgages of real estate, and this was recognized as sufficient.⁴ Where the statute provided for the record of deeds and other instruments, but did not specify mortgages, nor define the consequences of an omission to record, nor what advantage any other mortgage would acquire by superior diligence in recording, but the recorders were in the habit of recording mortgages the same as deeds, and it was a general, though not entirely universal, custom to have them recorded, it was held that the record of a mortgage was constructive notice.⁵

¹ *Van Cortland v. Tozer*, 17 Wend. 338; s. c. 20 Wend, 423; *Carrier v. Hampton*, 11 Ired. 307; *ante*, §122, and see also, *Beals v. Hale*, 4 How. 37.

² *Milligan v. Dickson*, Pet. C. Ct. 433, 438.

³ *McKeen v. Delancy*, 5 Cr. 22.

⁴ *Anthony v. Butler*, 13 Pet. 423. Where duplicate copies of deeds were regularly deposited in the registrar's office, not bound into volumes but classified and indorsed, this was held to constitute a "book of record." *Mumford v. Wardwell*, 6 Wall. 423.

⁵ *Wells, Fargo & Co. v. Smith & Neslin*, 2 Utah, 39. In this case there is a dissenting opinion by Mr. Justice Emerson, holding that the recording acts apply only to such instruments as the law by general or special terms requires to be recorded; and that statutes which are only permissive in their language, and which do not declare the record to be notice, are not mandatory, and the record will have no other effect than that prescribed; citing *Boyd v. Schlossinger*, 59 N. Y. 301; *Cook v. McChristian*, 4 Cal. 23; *Farmer's Bk. v. Bronson*, 14 Mich. 361.

§189. Record Necessary to the Validity of the Instrument, When.

The statutes usually declare an unrecorded deed void as against creditors and subsequent purchasers without notice. The general rule is that the execution and delivery of the conveyance passes the title as between the parties to it, and as against third persons with actual notice of it, though the instrument be not recorded.¹ To this rule, however, there are a few exceptions. In Louisiana and North Carolina, the statutes make registry essential to the validity of a conveyance of realty;² and in Arkansas and Ohio, to the lien of a mortgage; without, in either case, any exception or specification as to third parties without notice.³ So, in Tennessee, as to deeds of assignment for the benefit of creditors; and in Texas as to bills of sale of live stock sold upon the open range without actual delivery.⁴ The purpose of record is to give notice to third parties, but where these statutes prevail, actual notice will not usually, with respect to mat-

¹ *Portis v. Hill*, 30 Tex. 529; s. c. 98 Am. Dec. 481; *Stewart v. Mathews*, 19 Fla. 752; *Harrison v. McWhirter*, 12 Neb. 152; s. c. 10 N. W. Repr. 545; *Jackson v. Allen*, 30 Ark. 110; *Stephens v. Williams*, 46 Iowa, 540; *Vose v. Morton*, 4 Cush. 27; s. c. 50 Am. Dec. 750; *Jackson v. Burgott*, 10 Johns. 457; s. c. 6 Am. Dec. 349; *Phillips v. Green*, 3 A. K. Marsh. 7; s. c. 13 Am. Dec. 124; *Raines v. Walker*, 77 Va. 92. *Hunter v. Watson*, 12 Cal. 363; s. c. 73 Am. Dec. 543; *ante*, §54.

² *Harang v. Plattsmier*, 21 La. Ann. 426; *Tessier v. Hall*, 7 Mart. 411; *Adams v. Daunis*, 29 La. Ann. 315; Civ. Code La. §3342; *Payne v. Pavey*, 29 La. Ann. 116; *Rochereau v. Delacroix*, 26 La. Ann. 584.

As registry is necessary to pass the legal title, the surrender of an unrecorded deed revests title, if the rights of third parties have not intervened. *Fortune v. Watkins*, 94 N. C. 304; citing *Davis v. Inscoc*, 84 N. C. 396; *Austin v. King*, 91 N. C. 280; *Miller v. Tharel*, 75 N. C. 148. But an unregistered deed held to convey an equitable title which will prevail over a subsequent deed taken with notice. *Phifer v. Barnhart*, 88 N. C. 333; citing, *Hodges v. Spicer*, 79 N. C. 223.

³ *Home Build. Ass'n v. Clark*, 43 O. St. 427; s. c. 1 West. Repr. 337; *Dodd v. Parker*, 40 Ark. 536; *Bloom v. Noggle*, 4 Ohio St. 45; *Bercaw v. Cockerill*, 20 Ohio St. 163; *Mayham v. Coombs*, 14 Ohio, 428; *Stansell v. Roberts*, 13 Ohio, 148; s. c. 42 Am. Dec. 193; *Fry v. Martin*, 33 Ark. 203; Ark. Dig. (1874), §4287-8.

⁴ *Lookout B'k v. Noe*, 86 Tenn. 21 (citing Code [Mil. & Ver.], §§2837, 2890; *Wilson v. Eifler*, 11 Heisk. 188; *Coward v. Culver*, 12 Heisk. 541); *Black v. Vaughan*, 70 Tex. 47; s. c. 7 S. W. Repr. 604.

ter embraced in the statutes, supply the want of registry.¹ The courts, however, are not entirely agreed as to the effect of such statutory provisions upon the instruments as between the parties to it; but the decided weight of authority is to the effect that the conveyance passes an equitable title that will, as between the parties, be enforced with substantially the same effect as though it were the legal title.² If recording is by the statute declared to be essential to the validity of a married woman's deed, it is held that no title whatever passes by her conveyance until the instrument is recorded.³

§190. Unauthorized Record Made Effective by Subsequent Matters of Law and Fact.

Where a conveyance is recorded without authority of law, such record may afterwards, it seems, be made effective to impart constructive notice by subsequent matters, and without a second transcription of the instrument. The power of the legislature to validate defective records by force of

¹ *Ante*, §165, and cases cited in the notes above; *Robinson v. Wilmoughby*, 70 N. C. 358; *Fleming v. Bergin*, 2 Ired. Eq. 584.

² *Phifer v. Barnhart*, 88 N. C. 333; *Hodges v. Spicer*, 79 N. C. 223.

The Maryland statute provides that "no deed of real property shall be valid for the purpose of passing title unless acknowledged and recorded as herein directed." Rev. Code (1878), tit. 24, §18. Yet in that state actual knowledge of a prior unrecorded deed is sufficient. *Insolvent Estate of Leiman*, 32 Md. 225; *Price v. McDonand*, 1 Md. 403; s. c. 54 Am. Dec. 657; *Johns v. Scott*, 5 Md. 81.

Art. 4564, Rev. Stats. Tex. provides that "Persons may dispose of live stock * * * as they run in the range, by the sale and delivery of the marks and brands; but in every such case the purchaser in order to acquire title thereto, shall have his conveyance or bill of sale of such stock recorded." Construing this statute, it is said: "The bill of sale and its record are absolute prerequisites to the acquisition of title. The unregistered instrument is not avoided merely as to persons acquiring an interest in the property or title to it without notice, but the transfer does not take effect as to any one or for any purpose." *Black v. Vaughan*, 70 Tex. 47; s. c. 7 S. W. Repr. 604.

³ *Sewall v. Haymaker*, 127 U. S. 719; *Rorer v. Roanoke B'k*, 83 Va. 589; s. c. 4 S. E. Repr. 720. 731; *Ludlow v. O'Neil*, 29 Ohio St. 181. In Florida, under a nearly similar statute it is held that a married woman's title passes, as between the parties without a record of the deed. *Christy v. Burch* (Fla.), 2 South. Repr. 258.

curative statutes, has been already considered, and may in a general sense be declared unquestionable. In these instances the records so validated are usually designated in the statute, and the legislative intent to give to them, as already made, the effect of notice from the date of the statute, is expressly declared. But a different state of case is presented where a statute merely authorizes the recording of a certain class or kind of instruments not theretofore embraced in the registry acts. Does such a statute give effect to the record of an instrument of the kind named in the act, such record having been previously made without authority of law? or will a new record of the instrument be necessary? It seems to have been held by the Supreme Court of the United States that the original record in such case will be sufficient; but the question may be regarded as an open one, upon which different courts will reach contrary conclusions.¹ Registration is statutory, and where such effect is designed, it can easily be so declared in the statute, without being left to doubtful construction, and without imposing upon subsequent parties the duty of searching back for records not authorized to have been made, and which may, therefore, reasonably be supposed not to exist.

Where a mortgage of slaves was recorded in one county, the slaves being at the time of its making and recording in another county, and they were afterwards removed to the former, but the deed was not recorded anew, a second mortgage made and recorded in the former county was held to prevail over the first. Such subsequent removal of the

¹ *Fowler v. Merrill*, 11 How. 375. The statute of Arkansas under construction is not fully set out in the opinion, and the matter of actual notice seems to have been a controlling issue in the case. It cannot be regarded as a very strong or clear authority for the ruling stated in the text.

Where an acknowledgment was taken and certified in a form not then authorized by statute, a subsequent adoption by the legislature of the same form that had been thus used, did not validate the previous acknowledgment. *Tex. Land Co. v. Williams*, 51 Tex. 51.

slaves, it is said, could not give life and energy to the record, which had been void before. A subsequent purchaser or creditor would not look to the registry of conveyances in that county for any time previous to such removal, because during such prior time the slaves were not there, and he could not expect to find there any mortgage of slaves not in that county.¹

§191. Unrecorded Deed as Affected by Suit.

Sometimes by force of statutes aside from the general recording acts, and having relation to the effect and procedure of suits to quiet title, the holder of an unrecorded deed will be cut off and his rights concluded by judgment

¹ Lane v. Mason, 6 Leigh, 520.

Where a deed is inoperative at the time of its record, as where it is recorded before the time of its delivery, the record becomes fully operative as notice from that date; and the rule will apply where the deed is intended as a mortgage, and the statutes require that it shall be recorded as such. If recorded as a deed, upon a subsequent purchase of the equity of redemption by the mortgagee, the record becomes fully operative. Warner v. Winslow, 1 Sandf. Ch. 430; 1 Jones on Mort., §541; citing Foster v. Beardsley Scythe Co., 47 Barb. 505; Jackson v. Richards, 6 Cow. 617; Hood v. Brown, 2 Ohio, 266; Mut. Benefit Life Ins. Co. v. Rowand, 26 N. J. Eq. 389; Houfes v. Shultze, 11 Chicago L. N. 75; s. c. 2 Bradw. 196. In these instances the record is of a character authorized to be made, and is made in the form and at the place as required by law, while the outstanding matter of fact affecting the record, is of a kind not calculated to mislead or injuriously affect third persons with relation to want of notice.

The execution and record of a mortgage before its delivery to and acceptance by the mortgagee, gives it no priority over an intervening lien recorded before its delivery. Woodbury v. Fisher, 20 Ind. 337; s. c. 83 Am. Dec. 325.

Where a registry act confirmed the registry of all conveyances theretofore recorded, provided they had been authenticated for record in a certain manner prior to such recording, and also prescribed the same mode of authentication for all conveyances thereafter to be made and recorded, a deed which was thus authenticated before the act, but not recorded until afterwards, was held duly registered. Butler v. Dunagan, 19 Tex. 559. So a statute providing for the record of assignments of "any mortgage of record" has been held operative as to assignments already then made and prospective, to the extent of requiring their record as against subsequent parties. The Conn. Co. v. Talbot, 113 Ind. 373; s. c. 3 Am. St. Rep. 655; People v. Spicer, 99 N. Y. 225; Excelsior Co. v. Keyser, 62 Miss. 158. See Bloom v. Sims, 27 S. Car. 90.

against his grantor in whom the record title stands.¹ But in the absence of such statutes, one holding an unrecorded deed will not ordinarily be bound by a judgment quieting the title of the land against his grantor holding the record title, in a suit begun after the delivery of such deed, especially if the deed be recorded before the judgment is rendered.² Where the plaintiff in the suit claims under some character of title emanating directly from the defendant, that is, the grantor holding the record title, the case might be different; but the rule stated applies where the suit is to quiet a tax title. Claimants under the tax title have been said not to claim under such grantor. While persons claiming under him subsequently to the filing of such suits would be barred by the judgment, yet persons claiming under a prior conveyance, though not recorded until after suit begun, would not be affected by the judgment. As to prior grantees, such judgment is *res inter alios*.³

- Utleigh v. Fee, 33 Kan. 683; Clark v. Connor, 28 Iowa, 311; Leonard v. N. Y. Bay Co., 28 N. J. Eq. 192; Aldrich v. Stephens, 49 Cal. 676; Walker v. Goldsmith, 14 Or. 125; s. c. 12 Pac. Repr. 537.

² Smith v. Williams, 44 Mich. 240; Davenport v. Turpen, 41 Cal. 100; Walker v. Goldsmith, *supra*; Irvin v. Smith, 17 Ohio, 226.

³ Smith v. Williams, 44 Mich. 240; Windom v. Schappell (Minn.), 38 N. W. Repr. 757; s. c. 27 Cent. Law Jour. 304.

By statute in Minnesota, an unrecorded conveyance is void against a judgment lien only when the judgment is "against the person in whose name the title to such land appears of record prior to the recording of such conveyance." Coles v. Berryhill, 37 Minn. 56; s. c. 33 N.W. Repr. 213.

Courts cannot require a recorder to correct his record so as to conform to a judgment; a new deed should be decreed. Toops v. Snyder, 47 Ind. 91.

Where a third person purchases property under a judgment, the general rule is that a subsequent reversal of the judgment will not affect his title. Public policy requires this to encourage bidding at judicial sales. Taylor v. Boyd, 3 Ohio, 337, 352; Reynolds v. Harris, 14 Cal. 667; s. c. 76 Am. Dec. 459; Irwin v. Jeffers, 3 Ohio St. 389; Davis v. Gaines, 104 U. S. 386; Gott v. Powell, 41 Mo. 416; Stroud v. Casey, 25 Tex. 740; Taylor v. Lauer, 26 La. Ann. 307; Woodcock v. Bennett, 1 Cow. 711; s. c. 13 Am. Dec. 568; Stinson v. Ross, 51 Me. 556; Fergus v. Woodworth, 44 Ill. 374; Flaster v. Fleming, 56 Ill. 457; Coster v. Peters, 7 Robt. 386; Jessup v. City Bk., 15 Wis. 604; Hanschild v. Stafford, 27 Iowa, 301; Dorsey v. Thompson, 37 Md. 25; Porter v. Robin-

son, 3 Marsh., A. K., 253; s. c. 13 Am. Dec. 153; Wood v. Jackson, 3 Wend. 9; s. c. 22 Am. Dec. 603; Lovett v. German Reformed Church, 12 Barb. 67; Leslie v. Richardson, 60 Ala. 563; Marks v. Cowles, 61 Ala. 299. The rule does not apply where the judgment creditor himself becomes the purchaser. Reynolds v. Harris, 14 Cal. 667; s. c. 76 Am. Dec. 459; Adams v. Odum (Tex.), 12 S. W. Repr. 34.

Registration of a deed after suit begun makes the deed admissible in evidence as a recorded instrument. Secrest v. Jones, 30 Tex. 596.

Additional note to §164.—Record of subsequent mortgage as notice to prior parties. The general rule stated, that the record of a junior mortgage is not notice to a prior mortgagee, and that actual notice in such case is necessary, is applied where the prior mortgage is to secure future advances, in the following cases: Lovelace v. Webb, 62 Ala. 271; Witezinski v. Everman, 51 Miss. 841; McDaniels v. Calvin, 16 Vt. 300; Ripley v. Harris, 3 Biss. 199; Nelson v. Boyce, 7 J. J. Marsh. 401; Ward v. Cooke, 17 N. J. Eq. 93; and see also, Robinson v. Williams, 22 N. Y. 380; Truscott v. King, 6 N. Y. 166.

For cases, besides those cited in §164, holding that the record of the junior mortgage charges a prior mortgagee with notice, as to making further advances, see Kramer v. Bank, 15 Ohio, 254; Collins v. Carlile, 13 Ill. 254; Ackerman v. Hunsicker, 21 Hun, 53; Meeker v. Clinton, 2 La. Ann. 971; Adams v. Wheeler, 10 Pick. 199; Ketcham v. Wood, 22 Hun, 64.

The record of a mortgage to secure future advances should give the necessary information as to the certainty, purpose and extent of the mortgage, so as to enable third persons, by the exercise of ordinary diligence and prudence to ascertain the character and extent of the liabilities or obligations covered by it. Thomas v. Kelsey, 30 Barb. 268; Mich. Ins. Co. v. Brown, 11 Mich. 265. See further as to mortgages of this character, Walker v. Walker, 17 S. Car. 329; Hendrix v. Gore, 8 Or. 406; Jones v. N. Y. Guaranty Co., 101 U. S. 622; Johnson v. Anderson, 30 Ark. 745; Shirras v. Caig, 7 Cranch, 34; Forsyth v. Preer, 62 Ala. 443; Gun v. Jones, 67 Ga. 398; Summers v. Roos, 42 Miss. 749; Foster v. Reynolds, 38 Mo. 553; McCarty v. Chalfant, 14 W. Va. 531; Evenson v. Bates, 58 Wis. 24; Kline v. Glass, 53 Tex. 37; Collier v. Faulk, 69 Ala. 58.

CHAPTER 8.

CREDITORS AND SUBSEQUENT PURCHASERS.¹

- §192. Rights of creditors at common law and in equity.
- 193. Creditors under the statutes.
- 194. Statutory distinctions—Subsequent creditors.
- 195. Must be creditors of the grantor.
- 196. Only lien creditors protected.
- 197. Notice to creditors.
- 198. Notice good if before judgment lien obtained.
- 199. Notice to purchaser under the judgment.
- 200. Continued—Notice to creditor and purchaser.
- 201. Purchaser protected by the recording acts.
- 202. *Bona fide* purchaser defined.
- 203. Purchaser of the legal title.
- 204. Valuable consideration.
- 205. Consideration must be actually paid, when.
- 206. Part payment.
- 207. Antecedent debt as valuable consideration.
- 208. Extension of time and the like.
- 209. Mortgagee a purchaser.
- 210. Trustee a purchaser.
- 211. Assignee for benefit of creditors not a purchaser.
- 212. Purchaser at execution sale protected.
- 213. Purchaser at bankrupt sale not protected.
- 214. Purchaser of same property from same grantor.

§192. Rights of Creditors at Common Law and in Equity.

The recording acts are designed chiefly for the protection of subsequent parties whose interests may be affected by the want of notice, and the question as to how far creditors are within this latter class, and entitled to the protection of the registry laws, will be now considered.¹ It is well settled that at common law the lien acquired by judgment, or the levy of an execution, extends to and binds only such title or in-

¹ See *ante*, §10, where the general statutory features of the subject are presented.

terest as the debtor really has in the land at the date of the judgment or the levy under which the lien is claimed.¹ The judgment creditor is not regarded as a purchaser; he has no right to the land, neither *jus in re* nor *ad rem*.² It is also an established doctrine of equity jurisprudence that the legal lien of a judgment binds only the actual interest of the debtor, subject to all existing equities valid against the debtor; and that prior equitable interests *in rem*, including equitable liens upon specific parcels of land, have priority of right over the general lien of a docketed judgment.³ The recording of a conveyance not being as a rule essential to its validity, or to the divestiture by it of legal title, or at least of equitable title or interest, it follows that the rights of creditors as against unrecorded conveyances by the debtor must depend entirely on the terms of the registry acts.⁴ What is said in the succeeding sections of this chapter in reference to the rights of creditors will have relation principally to the law as it exists in those states whose statutes in some way recognize creditors as entitled to the protection of the recording acts.⁵ In those states where creditors

¹ *Grace v. Wade*, 45 Tex. 522; *Floyd v. Harding*, 28 Gratt. 401; *Langton v. Horton*, 1 Hare, 549; *Rogers v. Benner*, 45 N. Y. 379; *Brown v. Pierce*, 7 Wall. 205; *Money v. Dorsey*, 7 Sm. & M. 15; *Ayres v. Duprey*, 27 Tex. 607; s. c. 86 Am. Dec. 657; *Heister v. Fortner*, 2 Binn. 40; s. c. 4 Am. Dec. 417; *Norton v. Williams*, 9 Iowa, 528; *First Nat. Bank v. Hayzlett*, 40 Iowa, 659.

² *Brace v. Marlborough*, 2 P. Wms. 491; *Finch v. Winchelsea*, 1 *Id.* 277; *Harrall v. Gray*, 10 Neb. 186; *Greenleaf v. Edes*, 2 Minn. 264; *Hoy v. Allen*, 27 Iowa, 208; *Holden v. Garrett*, 23 Kan. 98.

³ *Everett v. Stone*, 3 Story, 446; *Hackett v. Callender*, 32 Vt. 97; *Baker v. Martin*, 12 Wall. 150; *Schroeder v. Gurney*, 73 N. Y. 430; *Wilcoxon v. Miller*, 49 Cal. 193; *Apperson v. Burgett*, 33 Ark. 328; *Kelly v. Mills*, 41 Miss. 267; *Galway v. Malchow*, 7 Neb. 285; *Sappington v. Oeschli*, 49 Mo. 244.

⁴ In Nebraska an unrecorded deed, it seems, takes over a judgment or attachment lien. *Mansfield v. Gregory*, 8 Neb. 432; s. c. 9 N. W. Repr. 87; provided it be recorded before the record of a deed based on the judgment or attachment. *Harrall v. Gray*, 4 N. W. Repr. 1040; although creditors are within the terms of the registry act of that state. Gen. Stats. Neb. 875, §16.

⁵ The lien of a judgment will attach against the interest of a debtor, though the deed to the debtor be not recorded. *Gallaugh v. Congre-*

are not within the protection of the registry acts, the recording of a conveyance by the debtor at any time before a sale under execution in favor of the creditor, is sufficient as against the execution purchaser.¹

§193. Creditors Under the Statutes.

In many instances the statutes have modified and to some extent entirely abrogated the common law rule stated in the preceding sections. In nearly one-half the states creditors are by some express terms, and in some degree, if not fully, placed within the protection of the registration laws.² In most of these states unregistered instruments are declared void as against all creditors, or creditors without

gation, 35 La. Ann. 829. And so, also, though the title of the debtor stands of record in another's name. *Dickson v. Hynes*, 36 La. Ann. 684.

In Alabama a judgment lien is superior to an unrecorded deed, unless possession gives notice of the grantee's rights. *King v. Paulk*, 4 South. Repr. 825; 85 Ala. 186; *Draper v. Bryson*, 26 Mo. 108; s. c. 69 Am. Dec. 483.

¹ *Schroeder v. Gurney*, 73 N. Y. 430; *Hoy v. Allen*, 27 Iowa, 208; *Everett v. Stone*, 3 Story, 446. And that a creditor is not protected against an unrecorded deed, see *Sigworth v. Meriam*, 66 Iowa, 477; s. c. 24 N. W. Repr. 4; *Holden v. Garrett*, 23 Kan. 98; *Patton v. McDonald*, 43 Mo. 93; *Sappington v. Oeschli*, 49 Mo. 244; *Orth v. Jennings*, 8 Blackf. 420; *Finch v. Winchelsea*, 1 P. Wms. 277; *Burn v. Burn*, 3 Ves. 582; *Pixley v. Huggins*, 15 Cal. 127; *Galway v. Malchow*, 7 Neb. 285; *Righter v. Forester*, 11 Bush, 278; *First National Bank v. Hayzlett*, 40 Iowa, 659; *Baze v. Arper*, 6 Minn. 220; *Kelly v. Mills*, 41 Miss. 267; *Herbert v. Mechanics' Ass'n*, 2 C. E. Green, 497; s. c. 90 Am. Dec. 601; *N. W. Co. v. Mahaffey*, 36 Kan. 152; *Moorman v. Gibbs* (Iowa), 39 N. W. Repr. 832; *Morton v. Robards*, 4 Dana, 258; *Thomas v. Kelsey*, 30 Barb. 268; *Walton v. Hargrove*, 42 Miss. 18; s. c. 97 Am. Dec. 429.

In Oregon, although creditors are not named in the recording statute (*Hill's Ann. Laws*, 1887), yet it is held that the lien of a judgment, docketed before the record of a deed has priority, unless the judgment lien was acquired with knowledge or notice of the unrecorded instrument. *Baker v. Woodward*, 12 Or. 3; s. c. 6 Pac. Repr. 173; citing *Stannis v. Nicholson*, 2 Or. 332; *U. S. v. Griswold*, 7 Saw. 332; *Lamberton v. Merchant's Bk.*, 24 Minn. 281.

In Georgia the lien of a judgment rendered before the record of a mortgage is superior, although there had been a statutory foreclosure of the mortgage when the judgment was rendered. *Richards v. Myers*, 63 Ga. 762.

² For list of the states, see notes to §10, *ante*.

specification or limitation of the term; in a few, as against lien creditors;¹ and in yet a few others, as against subsequent creditors,² or subsequent lien or judgment creditors.³ It is important that the terms of the several statutes be distinctly kept in view while considering the conflicting decisions of the various state courts relating to the rights of creditors as against unrecorded conveyances. In a few instances a distinction is made as between mortgages and other instruments of conveyance, either by virtue of creditors being named only in the recording statute applicable to mortgages,⁴ or by virtue of mortgages being denied any lien or validity until registered.⁵

§194. Statutory Distinctions—Subsequent Creditors.

In South Carolina and Delaware only subsequent creditors are protected by the statute;⁶ in Tennessee the statute specifies “existing or subsequent creditors,”⁷ which would seem to exclude only those creditors whose debts had been already paid. A statutory period of forty days is allowed for recording in South Carolina, and it is held that where a mortgage is recorded within its time, it has precedence over debts contracted between its date and its record, but not so when recorded after the forty days;⁸ and a judgment obtained after the execution of a mortgage upon a debt contracted before its execution, is held not to be a subse-

¹ Arkansas Digest (1874), ch. 29, §860; Code of Tenn. (M. & V., 1884), §2890; Code of Ala., §2166; Gen. Stats. Colo. (1883), ch. 18, §215.

² Rev. Stats. of S. Car., §1776. In Delaware the statute reads “subsequent fair creditor.” Rev. Code, 504, §17.

³ Rev. Laws of N. J. (1877), 155, §14; Stats. of Minn. (1878), p. 537, §21.

⁴ Code of Ga. (1882), §§1957, 2705.

⁵ Rev. Stats. of Ohio, §4133; Code of N. C., §1254; Rev. Stats. of Ark., §4288.

⁶ Rev. Stats. of S. Car., §1776; Rev. Code of Del., p. 504, §17.

⁷ Code of Tenn. (M. & V., 1884), §2890; Butler v. Maury, 10 Humph. 420; Lookout Bk. v. Noe, 86 Tenn. 21; s. c. 5 S. W. Repr. 433.

⁸ King v. Fraser, 23 S. Car. 543; Piester v. Piester, 22 S. Car. 139; McKnight v. Gordon, 13 Rich. Eq. 222; s. c. 94 Am. Dec. 164; Williams v. Baird, 1 S. Car. 309.

quent debt.¹ In Maryland, as against all creditors who have become so before the recording of a deed, without notice, the deed is good only as a contract to convey.² In the Alabama statutes, judgment creditors are the only creditors specified; in Colorado, conveyances take effect from filing, as to "subsequent *bona fide* purchasers and incumbrancers by mortgage, judgment or otherwise, not having notice thereof;"³ and in Minnesota, an unrecorded deed is void as against any attachment or judgment obtained at the suit of any person against the person in whose name the title to the land appears of record.⁴ In New Jersey, the specification is of a "subsequent judgment creditor," but there may be quite a distinction between a subsequent creditor, and a subsequent judgment creditor; as in the latter case, the term "subsequent" might be applied only to the judgment, which may be on an antecedent debt, while in the latter case, the debt itself must have been subsequently contracted.⁵ In Georgia, where the statute postpones an unrecorded mortgage to all other liens created or obtained prior to the actual record of the mortgage, it has been held that a junior judgment creditor having actual notice of a mortgage not properly recorded, was not affected by the notice,

¹ Caraway v. Caraway, 27 S. Car. 576; s. c. 5 S. E. Repr. 157.

² Rev. Code, tit. 24, §24. A judgment creditor with actual notice of a prior mortgage at the time he gets judgment, takes subject to the mortgage. Pfeaff v. Jones, 50 Md. 263. Where a court of equity decrees that a mortgage may be recorded after six months from its date, as to prior creditors, if there be no fraud, it relates back to its date. Stanhope v. Dodge, 52 Md. 483. A deed fraudulent and void as against antecedent creditors is valid, if recorded, as against subsequent creditors. Kane v. Roberts, 40 Md. 590; citing Williams v. Burbanks, 11 Md. 250.

³ Gen. Stats. of Colo. (1883), ch. 18, §215.

⁴ Gen. Stats. (1878), ch. 40, §21; Coles v. Berryhill, 37 Minn. 58; s. c. 33 N. W. Repr. 213; Lash v. Hardick, 5 Dill. 505.

⁵ Rev. Laws of N. J. (1877), p. 155, §14; Caraway v. Caraway, 27 S. Car. 576; s. c. 5 S. E. Repr. 157; and see Columbus Buggy Co. v. Graves, 108 Ill. 459; McKnight v. Gordon, 13 Rich. Eq. 222; s. c. 94 Am. Dec. 164.

because, in the given case, his debt was antecedent to the mortgage.¹

§195. Must be Creditors of the Grantor.

The creditors referred to in the statutes are creditors of the grantor in the unrecorded instrument.² Thus, judgment creditors of one who fraudulently had title made to his wife, are not creditors of the wife, and her deed of such title to a *bona fide* purchaser is valid against them, though they have no notice of it by record or otherwise.³ So, where a mortgage is executed by the ancestor, its want of registry cannot be invoked by judgment creditors of the heir, who levy on the property as that of the heir.⁴ In Virginia and West Virginia, however, a broader definition is by statute given to the word "creditors," and it is made to embrace all creditors who, but for the instrument, would have a right to subject the property to their debt.⁵

§196. Only Lien Creditors Protected.

Whether the creditors mentioned in the recording acts be specified as lien creditors, or simply as creditors, the rule

¹ Code of Ga., §1957; *Andrews v. Matthews*, 59 Ga. 466. But it is held that a junior judgment creditor is not entitled to take advantage of the fact that a mortgage has but one witness, or was not recorded within the statutory time. *Lowe v. Allen*, 68 Ga. 225; citing 60 Ga. 588; 62 Ga. 623-627.

In *Barrett v. Barrett*, 31 Tex. 344, it is said that only existing creditors were intended to be protected by the statute of 13 Elizabeth, and the present recording acts, and that the want of registry had no effect as against subsequent creditors. This distinction may be pertinent as relating to the question of fraud; but so far as notice is concerned, registry is of more practical consequence to subsequent than to existing creditors.

² *Pierce v. Turner*, 5 Cranch, 154; *Maguiac v. Thompson*, 7 Pet. 348; *Morgan v. Elam*, 4 Yerg. 375; *Baldwin v. Baldwin*, 2 Humph. 476.

³ *Chaffe v. Halpin*, 62 Miss. 1; and see *Dixon v. Cook*, 47 Miss. 226; *Laughbridge v. Boland*, 52 Miss. 558; *Miss. Val. Co. v. Chicago Ry. Co.*, 58 Miss. 846.

⁴ *Westervelt v. Voorhis*, 42 N. J. Eq. 179; *Voorhis v. Westervelt*, 43 N. J. Eq. 642; s. c. 3 Am. St. Rep. 315; 12 Atl. Repr. 533.

⁵ Code of Va. (1837), §2472; 79 Va. 147; *Kelly's Rev. Stats. W. Va.* (1878), ch. 96, §9. This was not the law under the act of 1792. *Pierce v. Turner*, 5 Cranch, 154-165.

obtains that the statutes apply to and protect only creditors who have acquired some character of lien upon or fixed interest in the property.¹ The rule applies to personal as well as real property, unless the terms of the statute are to the contrary.² The reason of the rule is that a general creditor has no higher equity than the purchaser under an unrecorded deed, who, if deprived of the property, would also be a creditor of the debtor grantor; and since the law does not make registry essential to the conveyance of title, the legal right of the purchaser must prevail, as also the equitable doctrine that specific equitable liens and interests *in rem* have priority over general claims and liens. From overweening confidence, it may be, in the debtor, the creditor has extended him credit; but by the same overweening confidence of the purchaser in his vendor, having acquired title to his land by deed, such purchaser may have neglected to record his deed. The policy of the law would be subverted if a creditor having no lien upon the property should yet be permitted to avail himself of the mere equal trust which he reposed in the vendor in giving him the credit to

¹ *Grace v. Wade*, 45 Tex. 522-527; *Lissa v. Posey*, 64 Miss. 352; *Pickett v. Banks*, 11 Sm. & M. 446; *Chester v. Grier*, 5 Humph. 26; *Hardaway v. Semmes*, 38 Ala. 657; *Center v. Bank*, 22 Ala. 743; *Ayres v. Duprey*, 27 Tex. 607; s. c. 86 Am. Dec. 657; *Nugent v. Priebastch*, 61 Miss. 402; *Catlin v. Bennatt*, 47 Tex. 166; *Lash v. Hardick*, 5 Dill. 505; *Stevenson v. Tex. Ry. Co.*, 105 U. S. 703.

² *Overstreet v. Manning*, 67 Tex. 657; s. c. 4 S. W. Repr. 248; *Ransom v. Schmela*, 13 Neb. 77; s. c. 12 N. W. Repr. 926; *Jones on Chat. Mort.*, §245; *Steward v. Beale*, 7 Hun. 405; s. c. 68 N. Y. 629; *Jones v. Graham*, 77 N. Y. 628; *Thompson v. Van Vetchen*, 27 N. Y. 568; *King v. Fraser*, 23 S. Car. 543; *Martin v. Rothschild*, 42 Hun. 410. While the statute as to chattel mortgages avoids these instruments as against creditors with or without notice, it makes no change as to the character of debt to be thus protected; and hence the rule in *Grace v. Wade*, 45 Tex. 522, as to real property, must obtain. *Overstreet v. Manning*, *supra*.

The superior equity of a general creditor has in some cases been recognized. *Sanger v. Guenther*, 73 Wis. 354; *Standard Co. v. Guenther*, 67 Wis. 101; s. c. 30 N. W. Repr. 298; though his lien was not fixed until after the prior mortgage was filed. *Thompson v. Van Vetchen*, 27 N. Y. 568; *Stewart v. Beale*, 7 Hun. 405; *Fraser v. Gilbert*, 11 Hun. 634.

defeat a *bona fide* purchaser.¹ In Virginia and West Virginia, by force of the terms of their recording acts, a more liberal rule obtains in favor of general creditors;² and so, in a few other states where recording is by peremptory terms of the statute made essential to the validity of a deed, or the lien of a mortgage, the rights of general creditors have been held superior to an unrecorded conveyance of the kind so placed within the terms of the registry act.³

¹ Barrett v. Barrett, 31 Tex. 344, 350; Ayres v. Duprey, 27 Tex. 607; s. c. 86 Am. Dec. 637; 2 Pom. Eq. Jur., §721; Kelly v. Mills, 41 Miss. 267; King v. Fraser, 23 S. Car. 543; Button v. Rathbone, 43 Hun. 137.

Where the statute gives priority only to a lien evidenced by some instrument required to be recorded, it has been held that when lands are omitted from a mortgage by mistake, the mortgage may be corrected as against a subsequent judgment, which will be subject to the equities of the mortgage. Galway v. Malchow, 7 Neb. 285; Comp. Stats. of Neb. (1881), ch. 73, §16.

In the case of Barrett v. Barrett, *supra*, it is held in a dissenting opinion by Morrill, C. J., that a creditor whose claim has been filed and approved by an administrator, is a lien creditor of the estate, entitled to the protection of the recording act.

² Dobyns v. Waring, 82 Va. 159; Guerrant v. Anderson, 4 Rand. 208; Cox v. Wayt, 26 W. Va. 807; Marsh v. Chambers, 30 Gratt. 299; Eidson v. Huff, 29 Gratt. 338; Bank v. Neal, 28 W. Va. 744; Sinclair v. Sinclair, 79 Va. 40.

³ Mayham v. Coombs, 14 Ohio, 428; Davidson v. Cowan, 1 Dev. Eq. 474; Davy v. Littlejohn, 2 Ired. Eq. 495; Dodd v. Parker, 40 Ark. 526; Fry v. Morton, 33 Ark. 203; Bercaw v. Cockerill, 20 O. St. 163; Bank v. Manufacturing Co., 96 N. C. 298; s. c. 3 S. E. Repr. 363; Sturgess v. Bank, 3 McLean, 140; Chamberlain v. Spargur, 86 N. Y. 603; s. c. 22 Hun. 437; Nellis v. Munson, 108 N. Y. 453, 457; s. c. 15 N. E. Repr. 739; McCoy v. Rhodes, 11 How. 131; Harang v. Plattsmier, 21 La. Ann. 426; Adams v. Dannis, 29 La. Ann. 315; Derbes v. Romero, 32 La. Ann. 283; Rochereau v. Delacroix, 26 La. Ann. 584.

The Arkansas, North Carolina and Ohio cases above relate to mortgages; the Louisiana cases to both deeds and mortgages, and the New York cases to deeds unacknowledged and not attested by witnesses.

In Tennessee the law in reference to creditors is substantially the same as in Virginia, the statute (Code, M. & V., §2390; Code Tenn. §2837, sub-div. 8) declaring that to be effectual against creditors, all mortgages and deeds of trust, of either real or personal property, must be properly executed and registered, or noted for registration. Lookout Bank v. Noe, 1 Pick. 21; s. c. 5 S. W. Repr. 433; Stanley v. Nelson, 4 Humph. 484; Lillard v. Ruckers, 9 Yerg. 64; Lyle v. Langley, 6 Baxt. 286; Butler v. Maury, 10 Humph. 420; Coward v. Culver, 12 Heisk. 541; Chester v. Greer, 5 Humph. 26; Green v. Goodall, 1 Cold. 412.

§197. Notice to Creditors.

In the states last referred to, where the unrecorded conveyance is regarded as absolutely void against creditors, actual notice of the unregistered instrument is held unavailing to affect their rights.¹ By virtue of the statute it is said in a recent Virginia case, the previously existing contract being in writing and not recorded, was a nullity, so that *quoad* the judgment creditor, the land was still the judgment debtor's, and subject to its lien.² As illustrating how entirely the protection thus accorded to creditors depends on the statute, it may be noted that as parol contracts are not within the Virginia acts, it is held that the title vesting in a purchaser under a valid contract of this kind is good against all the world except subsequent purchasers of the legal title for valuable consideration, without notice. "I speak now," said Mr. Justice Staples, "without reference to the recording acts. That the equitable estate of the purchaser is good against creditors of the vendor is incontrovertible. It has been over and over again decided that the judgment creditor can acquire no better right to the estate than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equi-

¹ Dobyns v. Waring, 82 Va. 159; Cowardin v. Anderson, 78 Va. 88; Gray v. Moseley, 2 Mumf. 545; and cases cited in the preceding section.

² Richardson, J., in Dobyns v. Waring, 82 Va. 159; citing Code of Va. (1873), ch. 114, §5; Guerrant v. Anderson, 4 Rand. 208; Marsh v. Chambers, 30 Gratt. 299; Eidson v. Huff, 29 Gratt. 338.

"But our recording acts make no distinction between creditors with notice and creditors without notice. * * * The recording acts, I admit, are founded in wisdom and justice; but it by no means follows that every instrument is to be made subservient to the policy of a registration system. It was said in the argument that Virginia is the only state beside Mississippi in which the right is conferred upon a creditor with notice of subjecting to his judgment the property in the hands of a *bona fide* purchaser. As the law is written, we must obey it. * * * If the rights of a large class of purchasers, recognized by the law as valid, are to be sacrificed because of a failure to do an act so often impossible to be done, it must be by the declared will of the legislature in clear and unmistakable language." Staples, J., in Floyd v. Harding, 28 Gratt. 401-411.

ties which exist at the time in favor of third persons, and a court of chancery will limit the lien of the judgment to the actual interest which the debtor has in the estate. The creditor is in no sense a purchaser; he has no equity whatsoever beyond what justly belongs to his debtor; his claim is to subject to his lien such estate as the former owner has, and no more."¹

§198. Notice Good if Before Judgment Lien Obtained.

The cases referred to in the preceding section to the effect that actual notice to a creditor is unavailing, constitute the exception and not the rule. The general rule is that actual notice is as effectual in the case of a creditor as in that of a purchaser, and that when the creditor has notice of a prior unrecorded conveyance by the debtor, at the time when he recovers his judgment, the lien of the judgment will be subordinate to the rights and equities created by the prior instrument.² Notice, however, after the lien has attached comes too late, whether it be actual notice, or be given by a subsequent record of the prior conveyance.³ Possession by the grantee is held sufficient notice to creditors.⁴

¹ *Floyd v. Harding*, *supra*, citing, *Withers v. Carter*, 4 Gratt. 407; *Brown v. Pierce*, 7 Wallace, 205; *Roger v. Bonner*, 45 N. Y. 379; *Money v. Dorsey*, 7 Sm. & M. 15.

² *Freiberg v. Magale*, 70 Tex. 116, 119; *City Nat. Bank v. Dayton*, 116 Ill. 257; s. c. 6 West. Repr. 879; *Pickett v. Banks*, 11 Sm. & M. 446; *Ayres v. Duprey*, 27 Tex. 593; s. c. 86 Am. Dec. 657; *Hart v. Farmer's Bk.*, 33 Vt. 252; *Wyatt v. Stewart*, 34 Ala. 716; *Loughridge v. Bowland*, 52 Miss. 546; *Goddard v. Prentice*, 17 Conn. 546; *Garwood v. Garwood*, 4 Halst. 193; *Lawrence v. Stratton*, 6 Cush. 163; *Williams v. Tatnall*, 29 Ill. 553; *Priest v. Rice*, 1 Pick. 164; *Britton's Appeal*, 45 Penn. St. (9 Wright), 172; *Thomas v. Vanlieu*, 28 Cal. 616; *O'Rourke v. O'Connor*, 39 Cal. 442; *Hitz v. National Bk.*, 111 U. S. 722; *Mead v. N. Y., etc., R. R. Co.*, 45 Conn. 199; *Weld v. Madden*, 2 Cliff. 584.

³ *Nugent v. Priebeatsch*, 61 Miss. 402; *post*, §212; *Taylor v. Doe*, 13 How. (Miss.), 287; *Hulings v. Guthrie*, 4 Pa. St. 123; *Ranney v. Hogan*, 1 Tex. Un. Cas. 253; *contra*, *Hubbard v. Walker*, 19 Neb. 94; s. c. 26 N. W. Repr. 713.

⁴ *King v. Paulk* (Ala.), 4 So. Repr. 825; *Noyes v. Hall*, 97 U. S. (7 Otto), 34; *Doyle v. Wade* (Fla.), 1 South. Repr. 516; *Cabeen v. Breck-*

§199. Notice to Purchaser Under the Judgment.

Where the lien of the judgment has attached and is held under the recording acts paramount to an unregistered conveyance, a purchaser at a sale under the judgement will not be affected with notice, unless the judgment creditor had received notice before his lien attached.¹ The purchaser holds the land free from all such claims not of record, on the ground that when a right has once been vested and made absolute, it cannot be divested or defeated by any mere notice. The policy of the recording acts requires this rule, as without it, the protection they afford could be taken away and the lien divested by the subsequent acts of the party having an adverse claim by virtue of an unregistered conveyance.² And so, even where the creditor had notice prior to his judgment, yet if the purchaser had no notice at the time of the sale, he is protected under the general rule which accords protection to subsequent purchasers in good faith for a valuable consideration and without notice.³ The notice is effectual only where it

inridge, 48 Ill. 91; Dickey v. Henarie, 15 Or. 351; s. c. 15 Pac. Repr. 464; Dixon v. Doe, 1 Sm. & M. 70; Priest v. Rice, 1 Pick. 164; Glendenning v. Bell, 70 Tex. 632; s. c. 8 S. W. Repr. 321; Ehle v. Brown, 31 Wis. 405; Woodson v. Collins, 56 Tex. 175.

¹ Condit v. Wilson, 36 N. J. Eq. (9 Stew.), 370; Sharp v. Shea, 32 N. J. Eq. 65; Wood v. Chapin, 13 N. Y. 509; s. c. 67 Am. Dec. 62; Jaques v. Weeks, 7 Watts, 261, 270; Smith v. Jordan, 25 Ga. 687; Uhler v. Hutchinson, 23 Penn. St. (11 Harris), 110; Pollard v. Cocke, 19 Ala. 188; De Vendell v. Hamilton, 27 *Id.* 156; Calder v. Chapman, 52 Penn. St. (2 P. F. Sm.), 359, 362; Massey v. Westcott, 40 Ill. 160; Fash v. Raviesies, 32 Ala. 451; Kelly v. Mills, 41 Miss. 267, 273; McFadden v. Worthington, 45 *Id.* 362; Henderson v. Downing, 24 Miss. 106; Guiteau v. Wisely, 47 Ill. 433; Potter v. McDowell, 43 Mo. 93; Davis v. Ownsby, 14 *Id.* 170; s. c. 55 Am. Dec. 105; Stillwell v. McDonald, 39 *Id.* 282; Greenleaf v. Edes, 2 Minn. 264; 2 Pom. Eq. Jur., §724; Doyle v. Wade (Fla.), 1 So. Repr. 516; Edwards v. Drinker, 9 Dana, 69; Stevenson v. Tex. Ry. Co., 105 U. S. (15 Otto), 703, 707; Nugent v. Priebatsch, 61 Miss. 402.

² Ranney v. Hogan, 1 Tex. Un. Cas. 252; Shepherd v. Burkhalter, 13 Ga. 443; s. c. 58 Am. Dec. 523; Loughridge v. Bowland, 52 Miss. 546, and cases cited above; McKnight v. Gordon, 13 Rich. Eq. 222; s. c. 94 Am. Dec. 164.

³ Jackson v. Chamberlain, 8 Wend. 625; Gower v. Doheney, 33 Iowa, 38; McKnight v. Gordon, 13 Rich. Eq. 222; s. c. 94 Am. Dec. 164; Hal-

is given both to the creditor before his lien attaches, and to the purchaser before the sale is complete.¹ Where the recording acts do not make a judgment lien superior to an unregistered conveyance, notice to the execution purchaser at the time of the sale will be sufficient,² and a judgment creditor purchasing at his own sale takes only the debtor's actual interest in the land.³

§200. Continued—Notice to Creditors and Purchasers.

Although the judgment lien, by virtue of the registry acts, be given precedence of rights claimed under an unrecorded conveyance from the debtor, without notice, yet where, though the legal title is in the judgement debtor, he holds the same under an unrecorded trust for another, the purchaser at execution sale having notice of the trust before purchasing, acquires no title.⁴ This arises from

Ioway v. Platner, 20 Iowa, 121; s. c. 89 Am. Dec. 517; *Rosser v. Bingham*, 17 Ind. 544; *Orth v. Jennings*, 8 Blackf. 420; *Davis v. Gains*, 104 U. S. 386; *Word v. Hollins*, 14 Md. 158; *McNitt v. Turner*, 16 Wall. 352; *Holms v. Buckner*, 67 Tex. 107; s. c. 2 S. W. Repr. 452; *Ayres v. Duprey*, 27 Tex. 593; s. c. 86 Am. Dec. 657; *Paine v. Mooreland*, 15 Ohio, 435; s. c. 45 Am. Dec. 585; *Morrison v. Funk*, 23 Pa. St. 421; *Ehle v. Brown*, 31 Wis. 405, 414; *Miles v. King*, 5 S. Car. 146; *Cooper v. Blakey*, 10 Ga. 263; *Rodgers v. Gibson*, 4 Yeates, 111; *Sieman v. Schurek*, 29 N. Y. 598; *Ohio Co. v. Ledyard*, 8 Ala. 836; *Scribner v. Lockwood*, 9 Ohio, 124; *Arledge v. Hall*, 54 Tex. 398.

¹ *Condit v. Wilson*, 36 N. J. Eq. 370, and cases cited above; 2 Pom. Eq. Jur., §724. A purchaser at mortgage sale, though he receive notice at the time of the sale, is protected if the mortgagee had no notice when his lien attached. *Whitfield v. Riddle*, 78 Ala. 99.

Notice, however, of a prior conveyance made with intent to defraud subsequent purchasers, and declared void by the statute, will not affect the rights of a subsequent purchaser for value. *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Buckle v. Mitchell*, 18 *Id.* 100; nor of a prior contract which the purchaser had, *ab initio*, a right to nullify. *Lufkin v. Nunn*, 11 Ves. 170.

² *Hoy v. Allen*, 27 Iowa, 208; *Valentine v. Havener*, 20 Mo. 133; *Davis v. Ownsby*, 14 Mo. 170; s. c. 55 Am. Dec. 105; *Byers v. Engles*, 16 Ark. 543; *Chapman v. Coats*, 26 Iowa, 291; *Walton v. Hargrove*, 42 Miss. 18; s. c. 97 Am. Dec. 429; *Swartz v. Stees*, 2 Kan. 436.

³ *McAdow v. Black*, 6 Mont. 601; s. c. 13 Pac. Repr. 357; *Herbert v. Mechanic's Ass'n*, 2 C. E. Green, 497; s. c. 90 Am. Dec. 60.

⁴ *Calvert v. Roche*, 59 Tex. 463; *Blankenship v. Douglass*, 26 Tex. 292; s. c. 82 Am. Dec. 608.

the fact that a resulting trust creates an equitable right not subject to nor governed by the registration statutes.¹ If, however, the trust is discharged by a conveyance of the legal title to the *cestui que trust* by deed which has not been recorded, the land is subject to the lien of a judgment against the trustee, in the absence of notice before the lien attaches.² The precedence given by some of the statutes and courts to purchase money mortgages and vendor's lien, over the claims of other creditors of the mortgagor or vendee in the deed, has been already noticed.³ Under the term "creditors," as used in the recording acts, the United States have been held to be creditors of a delinquent postmaster and his sureties.⁴

§201. Purchaser Protected by the Recording Acts.

In a number of states the purchaser protected by the recording acts is by statute defined to mean every person to whom shall be conveyed any estate or interest in land, and also every assignee of a mortgage, lease or other conditional estate.⁵ This statutory definition, however, is aimed

¹ Parker v. Coop, 60 Tex. 111; Harris v. Seinsheimer, 67 Tex. 356; Story's Eq. Jur., §1261; Perry on Trusts, §218; Carson v. Phelps, 40 Md. 73; *ante*, §19; Ross v. Kornrumpf, 64 Tex. 390.

² Calvert v. Roche, *supra*.

³ *Ante*, §§20, 172. "While something is due," said Chancellor Dunklin, "to the vendor who parts with his property, not less, certainly, is due to the subsequent creditor who has trusted the ostensible as well as the legal owner of the estate, without any knowledge of a secret incumbrance. The act requiring all mortgages of real estate, however formal and perfect, to be recorded within sixty days, may well be regarded as a legislative declaration of the prohibitory policy of the country against any such secret liens." McCorkle v. Montgomery, 11 Rich. Eq. 132; citing Bayley v. Greenleaf, 7 Wheat. 46.

⁴ Ross v. Prentiss, 4 McLean, 106; and so as to a State. Clemment v. Bartlett, 33 N. J. Eq. 43.

Where creditors are protected by the recording acts, notice of a prior vendor's lien on the land comes too late after the lien of the judgment has attached. Lissa v. Posey, 64 Miss. 352; s. c. 1 South. Repr. 500; Perry v. Priebatsch, 61 Miss. 402; McAfee v. Wheelis, 1 Tex. Un. Cas. 65. But see cases *ante*, §20.

⁵ Rev. Stats. of Wyoming (1887), §23; Rev. Stats. of Wis., §2242; Gen. Stats. of Minn. ch. 40, §25; Howell's Ann. Stats. Mich. §5688; Comp. Stats. Neb., ch. 73, §45; Rev. Stats. of N. Y. (Banks), pt. 2, ch. 3, §37.

rather at the legal character of the estate purchased, and the instruments evidencing it, and is manifestly not designed to embrace all the elements of the term "purchaser." The courts have held from the earliest date of the registry acts that although the purchaser be not designated in the statute as a "*bona fide*" purchaser, but merely as a subsequent purchaser, or a purchaser for valuable consideration, yet that good faith and want of actual notice is as essential in the one case as in the other.¹

§202. Bona fide Purchaser Defined.

A *bona fide* purchaser is one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside; and who purchases in the honest belief that his vendor had a right to sell, without notice actual or constructive of any adverse rights, claims, interests or equities of others in and to the property sold.²

¹ Van Rensselaer v. Clark, 17 Wend. 25; Jackson v. Burgott, 10 Johns. 457; s. c. 6 Am. Dec. 349; Hooker v. Pierce, 2 Hill, 650; LeNeve v. LeNeve, Amb. 436; s. c. 1 Ves. 64; 3 Atk. 646; Robeson's Appeal, 117 Pa. St. 628; s. c. 12 Atl. Repr. 51; 10 Cent. Repr. 822.

The subsequent purchaser spoken of by the statute is one who takes his deed after the actual execution of a deed to another. Fallas v. Pierce, 30 Wis. 443.

"Purchaser," in Ohio, is usually to be taken in its limited legal sense. Steele v. Spencer, 1 Pet. 552.

In Massachusetts, it has been said that the term "*bona fide* purchase" means only that the purchase shall be real, not feigned. Hill v. Ahern, 135 Mass. 148.

² Fargason v. Edrington, 49 Ark. 207, 214; s. c. 4 S. W. Repr. 763; 1 Perry on Trusts, §239; Merritt v. The Northern R. R. Co., 12 Barb. 605; Sanders v. McAfee, 42 Ga. 250; Warner v. Whitaker, 6 Mich. 133; s. c. 72 Am. Dec. 65; Blanchard v. Tyler, 12 Mich. 339; s. c. 86 Am. Dec. 57; Danbury v. Robinson, 1 McCart. 213; s. c. 82 Am. Dec. 244; Grace v. Wade, 45 Tex. 522; Roxborough v. Messick, 6 Ohio St. 448; Munn v. McDonald, 10 Watts, 270; Williams v. Shelby, 37 N. Y. 375; McLeod v. The National Bk., 42 Miss. 99; Tiffany v. Warren, 37 Barb. 571; Hall v. Delaplain, 5 Wis. 206; s. c. 68 Am. Dec. 57; Harper v. Bibbs, 34 Miss. 472; s. c. 69 Am. Dec. 397.

"The essential elements which constitute a *bona fide* purchase," says Mr. Pomeroy, "are three—a valuable consideration, the absence of no-

§203. Purchaser of the Legal Title.

It has been said that the term "purchaser" as used in the registry acts means a purchaser clothed with the legal title,¹ and that the purchaser of an equitable title or interest who knows the legal title is outstanding in another, and that he is purchasing merely an equitable title, cannot be a *bona fide* purchaser without notice.² These statements, however, must be qualified to such an extent that they can scarcely be said to correctly enunciate a rule. Equitable titles and interests are in a large measure and by the express terms of many of the statutes placed within the recording acts,³ and aside from this, the tendency of the courts is to extend the operation of the registry laws to include equitable as well as legal titles.⁴ Subsequent purchasers must ordinarily take an equitable title subject to all equities that exist in favor of the first vendor in whom the legal title remains, whether those equities are known to the subsequent purchaser or not, for the character of the title that is being acquired puts the purchaser on inquiry as to why the legal title is outstanding; but when this is said the principal difference between legal and equitable titles, so far as third purchasers under the recording acts are concerned, has been

tice, and the presence of good faith." 2 Eq. Jur., §745; citing Willoughby v. Willoughby, 1 T. R. 763, 767; Hardin v. Harrington, 11 Bush, 367; Briscoe v. Ashby, 24 Gratt. 454; Hausman v. Keigwin, 39 Tex. 34.

¹ Steele v. Spencer, 1 Pet. 552; Dosewell v. Buchanan, 3 Leigh, 365; s. c. 23 Am. Dec. 280; Oakly v. Ballard, Hemp. (U. S. C. Ct.), 475; Vattier v. Hinde, 7 Pet. 252; Butler v. Douglass, 1 McCrary, 630.

² York v. McNutt, 16 Tex. 13; s. c. 67 Am. Dec. 607; Walton v. Hargrove, 42 Miss. 18; s. c. 97 Am. Dec. 435; and notes thereto, citing Brown v. Ward, 6 Rich. Eq. 155; Goldsborough v. Turner, 67 N. C. 403; Stout v. Hyatt, 13 Kan. 232; Craig v. Leiper, 2 Yerg. 193; s. c. 24 Am. Dec. 479; Briscoe v. Ashby, 24 Gratt. 454; Vattier v. Hinde, 7 Pet. 252; Jarman v. Farley, 7 Lea, 141; Wailes v. Cooper, 24 Miss. 208; Chew v. Barnett, 11 S. & R. 389; White v. Nashville R. R. Co., 7 Heisk. 518; High v. Batts, 10 Yerg. 335; Caldwell v. Carrington, 9 Pet. 86.

³ Bellas v. McCarty, 10 Watts, 13, 25; Worley v. State, 7 Lea, 382; Parkist v. Alexander, 1 Johns. Ch. 394, and other cases cited *ante*, §19.

⁴ U. S. Insurance Co. v. Shriver, 3 Md. Ch. 381; Barrett v. Barrett, 31 Tex. 348; Bayley v. Greenleaf, 7 Wheat. 46; Philbrook v. Delano, 29 Me. 414; 2 Pom. Eq. Jur., §649; *ante* §§4, 19.

stated.¹ When one has paid the purchase price without notice, and has the full right to call for the legal title, he is a purchaser, though he may not have received the legal title.² The rule that the legal title must be obtained in order to give the doctrine of innocent purchaser any application as between equitable rights,³ does not apply where such equitable rights come within the provisions of the recording acts.⁴

§204. Valuable Consideration—Marriage.

The purchaser protected under the recording acts must be one who acquired his right for a valuable consideration.⁵ If he be a mere volunteer whose title has been derived by

¹ Thus, in *York v. McNutt*, 16 Tex. 14; s. c. 67 Am. Dec. 607; it is held that the assignee of a bond for title takes it subject to all the defenses to which it may have been liable in the hands of the first obligee, notwithstanding the assignee may have given a valuable consideration without any notice of the equities or defenses against the bond. And see *Hagerman v. Shirley*, 88 Mo. 424; s. c. 5 West. Repr. 368.

So, the assignee of a mortgage is usually held to take it subject to all equities in favor of the mortgagor. *Westbrook v. Gleason*, 79 N. Y. 23; *DeLancy v. Stearns*, 66 N. Y. 157; *Mott v. Clark*, 9 Pa. St. 399; s. c. 49 Am. Dec. 566; *McFarlane v. Griffith*, 4 Wash. C. Ct. 585.

² *Preston v. Nash*, 76 Va. 1, criticising and explaining *Dosewell v. Buchanan*, 3 Leigh, 365. For cases holding that the purchaser must not only have paid the consideration, but have obtained the conveyance, and other cases of similar character, see *Blight v. Banks*, 6 T. B. Mon. 192; s. c. 17 Am. Dec. 136; *Mut. Ass. Society v. Stone*, 3 Leigh, 218, 236; *Calais v. Scudder*, 2 Black. 372; and *Briscoe v. Ashby*, 24 Gratt. 473, 483, in which latter case is a very full presentation of the questions involved; also 2 Pom. Eq. Jur. 691, 755, citing *Wells v. Morrow*, 38 Ala. 125; *Bennett v. Titherington*, 6 Bush. 192; *Wigg v. Wigg*, 1 Atk. 382; *Tourville v. Naish*, 3 P. Wms. 307, and other cases.

³ *Hurst v. McNeil*, 1 Wash. C. Ct. 70; *Shirras v. Craig*, 7 Cranch, 34.

⁴ Thus, one who has made a contract of purchase merely, by entering state school lands under the terms of a statute, and who has no written evidence of title whatever, the patent not having issued, and only a small first payment to the state having been made, nevertheless has an interest embraced within the Texas registry acts; and a creditor, or an innocent purchaser of such interest, takes over an unrecorded conveyance of it, of which he had no notice. *Lewis v. Johnson*, 68 Tex. 448; s. c. 4 S. W. Repr. 644.

⁵ *Evans v. Templeton*, 69 Tex. 375; s. c. 5 Am. St. Rep. 71; *Spurlock v. Sullivan*, 36 Tex. 511; *Brown v. Welch*, 18 Ill. 343; s. c. 68 Am. Dec. 549; *Glidden v. Hunt*, 24 Pick. 221; *Union Canal Co. v. Young*, 1 Whart. 410; s. c. 30 Am. Dec. 212; *Haughwout v. Murphy*, 21 N. J.

gift, inheritance, devise or some kindred mode, he does not come within the term purchaser as used in these statutes.¹ Valuable consideration, within the meaning of the recording acts, has no necessary relation to the general law of contracts. It has been judicially declared to be the same as in the law of negotiable paper, and that the rights of a holder for such a consideration are governed by the same rules in both cases; and while this statement is, perhaps, too broad, it affords the nearest analogy that can be found.² Usually the valuable consideration consists of money, or something

Eq. 118; *Roxborough v. Messick*, 6 Ohio St. 448; s. c. 67 Am. Dec. 346; *Dickerson v. Tillinghast*, 4 Paige, 215; s. c. 25 Am. Dec. 528; *Kinney v. Consolidated Mining Co.*, 4 Saw. 382; *Wood v. Chapin*, 13 N. Y. 509; s. c. 67 Am. Dec. 62; *Palmer v. Williams*, 24 Mich. 328; *Gerson v. Pool*, 31 Ark. 85; *Worthy v. Caddell*, 76 N. C. 82; *Frey v. Clifford*, 44 Cal. 335; *Wormley v. Wormley*, 8 Wheat. 449; *Aubuchon v. Bender*, 44 Mo. 560; *Snowden v. Tyler*, 21 Neb. 199; s. c. 31 N. W. Repr. 631.

¹ *Pearce v. Jackson*, 61 Tex. 642; 2 Pom. Eq. Jur., §747, citing *Roseman v. Miller*, 84 Ill. 297; *Bowen v. Prout*, 52 *Id.* 354 (inheritance); *Evarts v. Agnes*, 4 Wis. 343; s. c. 65 Am. Dec. 314; *Upshaw v. Hargrove*, 6 Sm. & Marsh. 286, 292; *Boon v. Barnes*, 23 Miss. 136; *Swan v. Ligan*, 1 McCord Eq. 227; *Patten v. Moore*, 32 N. H. 382; *Frost v. Beckman*, 1 Johns. Ch. 288; *Bishop v. Schneider*, 46 Mo. 472; s. c. 2 Am. Rep. 533; *Morse v. Wright*, 60 Cal. 260.

A voluntary conveyance though not recorded, is valid against any subsequent voluntary conveyance of the same land by the grantor. *Way v. Lyon*, 3 Blackf. 76; *Snodgrass v. Ricketts*, 13 Cal. 359.

² *Pickett v. Barron*, 29 Barb. 505. It is the general rule that the transferee of a negotiable paper as security for an antecedent debt, may be a *bona fide* holder by the law merchant; but Mr. Pomeroy denies that this rule can be a precedent in determining the meaning of valuable consideration within the equitable doctrine of *bona fide* purchase. 2 Pom. Eq. Jur., §748; *Ashton's Appeal*, 73 Pa. St. 153.

The transfer, before maturity, of a negotiable note secured by a mortgage, carries with it the mortgage, free from any equities existing between the original parties, by virtue of the equitable doctrine which treats the mortgage as but an incident of the debt. *Perkins v. Sterne*, 23 Tex. 561; 76 Am. Dec. 72; 1 Jones on Mortgages, §834; citing *Gabbert v. Schwartz*, 69 Ind. 450; *Kelley v. Whitney*, 45 Wis. 110; s. c. 7 N. W. Repr. 126; *Billgery v. Ferguson*, 30 La. Ann. 84; *Logan v. Smith*, 62 Mo. 455; *Paige v. Chapman*, 58 N. H. 333; *Helmer v. Krollick*, 36 Mich. 371; *Sawyer v. Prickett*, 19 Wall. 146, 166; *Burbans v. Hutcheson*, 25 Kan. 625; *Webb v. Hoselton*, 4 Neb. 303; *Updegraff v. Edwards*, 45 Iowa, 513; *Duncan v. Louisville*, 13 Bush. 378; and to same effect, *McKamey v. Thorpe*, 61 Tex. 648, 653; *Brush v. Scribner*, 11 Conn. 388; *Payne v. Bensley*, 8 Cal. 260; s. c. 63 Am. Dec. 318; *ante*, §175, notes.

having an actual, pecuniary value; but in a few instances this is not essential. Marriage, for example, is a valuable consideration.¹ In a contest before the courts, to entitle a subsequent vendee to have a prior unregistered conveyance from his grantor to a third person postponed to his own subsequent conveyance, it must be proved that the purchase money was *bona fide* and truly paid, a recital of that fact in the deed not being sufficient;² yet for the purpose of the statute relating to the recording of conveyances, and to the effect of priority in that respect, the recital of one dollar paid shows a sufficient pecuniary consideration to entitle the grantee to be considered a purchaser for value.³ Whether the recital of an inadequate or merely nominal consideration in a recorded instrument will be sufficient to charge a subsequent party with notice of fraud, will depend upon the character of the instrument, and other circumstances.⁴

¹ Reed v. Gorman, 3 Daly, 414; Connor v. Stanley, 65 Cal. 183; Whelan v. Whelan, 3 Cow. 537; Verplank v. Sterry, 12 Johns. 536; s. c. 7 Am. Dec. 348; Ellinger v. Crowl, 17 Md. 361; Smith v. Allen, 5 Allen, 454; Lionberger v. Baker, 88 Mo. 417.

² Watkins v. Edwards, 23 Tex. 448; Overstreet v. Manning, 67 Tex. 657; Hawley v. Bullock, 29 Tex. 222; Nolen v. Gwyn, 16 Ala. 725; High v. Batte, 10 Yerg. 335; Jewett v. Palmer, 7 Johns. Ch. 65; Williams v. Hollingsworth, 1 Strob. Eq. 103; Boone v. Chiles, 10 Pet. 177, 211; Kimball v. Finner, 12 N. H. 248; Loyd v. Lynch, 28 Pa. St. 419, 424; s. c. 70 Am. Dec. 137; Henry v. Rainman, 25 Pa. St. 354, 360; s. c. 64 Am. Dec. 703.

³ Hendry v. Smith, 49 Hun. (56 N. Y. Sup. Ct.), 510-512, holding that Morris v. Word, 36 N. Y. 587; Duval v. Wilson, 9 Barb. 487, and Rockwell v. McGovern, 69 N. Y. 294, are not in conflict with it.

The recital is held sufficient for the record, though the dollar be not in fact paid. Nathans v. Arkwright, 66 Ga. 179.

⁴ The general rule is that the amount of the consideration, if otherwise in good faith, is not material. 2 Pom. Eq. Jur., §747; citing Wood v. Chapin, 13 N. Y. 509; s. c. 67 Am. Dec. 62; Cary v. White, 52 N. Y. 138, 142; Pickett v. Barron, 29 Barb. 505; Seward v. Jackson, 8 Cow. 406, 430; Westbrook v. Gleason, 79 N. Y. 23, 36, *per* Rapallo, J.

The recital alone is not usually sufficient to charge notice of fraud. Norman v. Towne, 130 Mass. 52; Davidson v. Little, 22 Pa. St. 245; s. c. 60 Am. Dec. 81; Gale v. Morris, 29 N. J. Eq. 222; Briggs v. Rice, 130 Mass. 50; but in connection with other matters, as that the deed is a quit-claim, it may be sufficient. Hume v. Franzen, 73 Iowa, 25; Webb v. Burney, 70 Tex. 322; s. c. 7 S. W. Repr. 841; Worthy v. Caddy, 76 N. C. 82, 86; *ante*, §179.

It is sufficient if the consideration be paid for the purchaser, at his request, by a third party who is his debtor.¹

§205. Consideration Must be Actually Paid at Time of Notice.

Notice of a prior conveyance or right received even after an agreement or written contract of purchase is made, but before actual payment thereon, will destroy the character of *bona fide* purchaser.² Proof that the purchase money has been "fully arranged," is not sufficient.³ If none of the price has been paid it is immaterial whether the conveyance has been delivered to the purchaser or not;⁴ if

¹ *Stator v. Neal*, 64 Tex. 222. A mortgagor who obtains a discharge from the mortgagee without any payment, is not protected as against one to whom the mortgage has been assigned. *N. Y. Life Co. v. Smith*, 2 Barb. Ch. 52; *Ely v. Schofield*, 35 Barb. 330. As to how far a wrongful discharge of record of a mortgage given to secure a negotiable note which has been transferred will protect a subsequent purchaser, as against the rights of the holder of the note, see *ante*, §175, and notes thereto.

² *Hunsinger v. Hoffer*, 110 Ind. 390; s. c. 11 N. E. Repr. 463; 9 West. Repr. 46; *Otis v. Payne*, 86 Tenn. 663; s. c. 8 S. W. Repr. 848; *Fraim v. Frederick*, 32 Tex. 294, 308; *Weaver v. Barden*, 49 N. Y. 286; *Boone v. Chiles*, 10 Pet. 177; *Campbell v. Roach*, 45 Ala. 667; *Villa v. Rodriguez*, 12 Wall. 323; *Palmer v. Williams*, 21 Mich. 328; *Baldwin v. Sager*, 70 Ill. 503; *Dresser v. Mo. Ry. Co.*, 93 U. S. 92; *Kitteridge v. Chatman*, 36 Iowa, 348; *Penfield v. Dunbar*, 64 Barb. 239; *Young v. Kellar*, 94 Mo. 581; s. c. 7 S. W. Repr. 293; 4 Am. St. Rep. 405; *Beaty v. Whitaker*, 23 Tex. 526.

³ *Lamar v. Hall*, 79 Va. 147. Where the consideration consisted of services performed and to be performed, and the proof did not show what proportion had been actually performed, it was held insufficient. *Morton v. Lowell*, 56 Tex. 643.

⁴ *Fletcher v. Ellison*, 1 Tex. Un Cas. 661, 671; *Wheaton v. Dyer*, 15 Conn. 307; *Carroll v. Johnston*, 2 Jones' Eq. 120; *Gibler v. Trimble*, 14 Ohio, 323; *Schultze v. Houfes*, 96 Ill. 335; *Leach v. Ansbacher*, 55 Pa. St. 85; *Preston v. Nash*, 76 Va. 1; *Phelps v. Morrison*, 24 N. J. Eq. 195; *Keys v. Test*, 33 Ill. 316; *Union Canal Co. v. Young*, 1 Whart. 410, 432; *Wilson v. Hunter*, 30 Ind. 466; *Patton v. Moore*, 32 N. H. 382; *Price v. McDonald*, 1 Md. 403; s. c. 54 Am. Dec. 657.

Some of the earlier American cases, following the English rule, hold, that notice received after payment, but before the conveyance is delivered, destroys the character of *bona fide* purchase. *Doswell v. Buchanan*, 3 Leigh, 394; s. c. 23 Am. Dec. 280; *Blight v. Banks*, 6 T. B. Mon. 192; s. c. 17 Am. Dec. 136; *Grimstone v. Carter*, 3 Paige, 421; s. c. 24 Am. Dec. 230; *Pillow v. Shannon*, 3 Yerg. 508; *Peabody v. Fenton*, 3 Barb. Ch. 451, 464, 465; *Fash v. Raviesies*, 32 Ala. 451; *Duncan v. John-*

all of it has been paid, the notice comes too late to prevent the purchaser from completing the transaction and obtaining the conveyance.¹ The giving of a non-negotiable obligation or security is not a sufficient payment, for upon failure of the consideration, the purchaser may be relieved from such obligations, either at law or in equity.² An irrevocable obligation such as a negotiable note, or a bid at sheriff's sale, or the assumption of a debt of the vendor in such manner as that the purchaser is thereby absolutely substituted as the debtor, is held to constitute payment;³ although in some cases proof has been required that a negotiable note given to the vendor has been actually negotiated by him so as to cut off the defense of failure of consideration.⁴

son, 13 Ark. 190; *Osborn v. Carr*, 12 Conn. 195, 198,[#] *Simms v. Richardson*, 2 Litt. 274; *ante*, §203.

¹ *Preston v. Nash*, 76 Va. 1; *Carroll v. Johnston*, 2 Jones' Eq. 120, and cases cited above; *Hardin v. Sparks*, 70 Tex. 429.

² *Beaty v. Whitaker*, 23 Tex. 528; *Westbrook v. Gleason*, 79 N. Y. 23; *Roseman v. Miller*, 84 Ill. 297; *Hutchins v. Chapman*, 37 Tex. 612; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Dickerson v. Tillinghast*, 4 Paige, 215; s. c. 25 Am. Dec. 528; *Kunkle v. Wolfersberger*, 6 Watts, 126.

³ *Case v. Jennings*, 17 Tex. 673; *Williams v. Beard*, 1 S. Car. 309; *Jackson v. Winslow*, 9 Cow. 13; *Freeman v. Deming*, 3 Sandf. Ch. 327; *Frost v. Beekman*, 1 Johns. Ch. 288.

⁴ *Rush v. Mitchell*, 71 Iowa, 333; s. c. 33 N. W. Repr. 367; *Kitteridge v. Chapman*, 36 Iowa, 348; 2 Pom. Eq. Jur., §751, citing *Baldwin v. Sager*, 70 Ill. 503; *Partridge v. Chapman*, 81 Ill. 137.

The absolute transfer of notes, bonds or other securities made by a third person will constitute payment. *Williams v. Beard*, 1 S. Car. 309; *Harris v. Norton*, 16 Barb. 264; *Patton v. Moore*, 32 N. H. 382; *High v. Batte*, 10 Yerg. 186. The payment of a note, by an indorser, is a valuable consideration, and if land be conveyed to him in satisfaction thereof, he is not chargeable with equities resting upon it of which he had no notice. *Harrold v. Owen* (Mich.), 31 N. W. Repr. 420.

That the transfer, by the payee, before maturity, of a negotiable note secured by a mortgage, carries with it the mortgage, free from any equities between the parties, see numerous cases cited in note to §204, *ante*. *Perkins v. Sterne*, 23 Tex. 561; s. c. 76 Am. Dec. 72; *Boatmen's Sav. Bank v. Grewe*, 84 Mo. 478; *Studebaker v. McCurgur*, 20 Neb. 500; s. c. 30 N. W. Repr. 686.

§206. Part Payment.

Where a purchaser has in good faith paid part of the consideration before receiving notice of a prior right, he will, as a rule, be protected to the extent of the payment actually made.¹ Courts of equity, it has been said, may afford this protection in several ways; as by permitting the plaintiff to enforce his claim to the whole land only upon condition of his doing equity by refunding to the defendant the amount already paid before receiving the notice; or even, when the plaintiff has been guilty of laches, or the defendant has made valuable improvements, by decreeing that the land itself should remain free from any claim on the plaintiff's part, and that his remedy should be confined to a recovery of the portion of the purchase money which was unpaid at the time the notice was received.² Where the purchaser, after knowledge of an outstanding prior equity such as a vendor's lien, then pays any remaining part of the consideration without seeing to its application to the extinguishment of the lien, this has been held an act which the law regards as *mala fides*, and he forfeits the protection of a court of equity as to the part paid before notice was received.³

¹ Huyler v. Dahoney, 48 Tex. 239; Wormley v. Wormley, 8 Wheat. 421; Fletcher v. Ellison, 1 Tex. Un. Cas. 672; Dresser v. Mo. Ry. Co., 93 U. S. 92; Kitteridge v. Chapman, 36 Iowa, 348; Youst v. Martin, 3 Serg. & R. 423; Curts v. Cissna, 7 Biss. 260; Fowler v. Merrill, 11 How. (52 U. S.), 375; Duphney v. Frenage, 5 Stew. & Port. 215; 1 Story Eq. Jur., §64; 2 Lead. Eq. Cas. 79; Kohl v. Lynn, 34 Mich. 360.

² Marchbanks v. Banks, 44 Ark. 48; 2 Pom. Eq. Jur., §750, citing Baldwin v. Sager, 70 Ill. 503; Haughwout v. Murphy, 21 N. J. Eq. 118; Frost v. Beekman, 1 Johns. Ch. 288; Farmer's Loan Co. v. Maltby, 8 Paige, 361; Paul v. Fulton, 25 Mo. 156; Union, etc., Co. v. Young, 1 Whart. 410, 431; Everts v. Agnes, 4 Wis. 343, and other cases.

³ Fraim v. Frederick, 32 Tex. 294, 308. This accords with the English rule which goes even to the extent of recognizing notice as sufficient in all cases, if given before the entire consideration is paid. Story v. Lord Windsor, 2 Atk. 630; Tourville v. Naish, 3 P. Wms. 307; Tildesly v. Lodge, 3 Smale & G. 543; Wigg v. Wigg, 1 Atk. 382.

§207. Antecedent Debt as Valuable Consideration.

Where property is taken in satisfaction of a pre-existing debt, or as security therefor, although this is a sufficient consideration as between the parties, the weight of authority is that it will not, of itself alone, constitute a valuable consideration under the recording acts sufficient to shut out the claim of prior equities.¹ As against such equities, a party to be entitled to protection must have acquired rights of which he would otherwise be deprived.² When a transaction of this kind is set aside for failure of consideration the debt still exists, and the purchaser is ordinarily in no worse condition than before.³ In a number of states, however, the rule does not obtain, and the discharge of a pre-existing debt is held a valuable consideration.⁴

¹ *McKamey v. Thorpe*, 61 Tex. 653; *Jewett v. Tucker*, 139 Mass. 566; *Steffan v. Bank*, 69 Tex. 513; s. c. 6 S. W. Repr. 823; *Overstreet v. Manning*, 67 Tex. 657; *Bybee v. Hawckett*, 12 Fed. Repr. 649; *Coddington v. Bay*, 20 Johns. 639; s. c. 11 Am. Dec. 342; *Story's Eq. Jur.*, §1503; *Willard's Eq. Jur.* 256; *Spurlock v. Sullivan*, 36 Tex. 511; *Union, etc., Inst. v. Duryea*, 67 N. Y. 84; *Dickerson v. Tillinghast*, 4 Paige. 215; s. c. 25 Am. Dec. 528; *Banks v. Long*, 79 Ala. 319; *Pancoast v. Duvall*, 26 N. J. Eq. 445; *Morse v. Godfrey*, 3 Story, 364; *Zorn v. Ry. Co.*, 5 S. Car. 90; *Metropolitan Bk. v. Godfrey*, 23 Ill. 579; *Clark v. Flint*, 22 Pick. 243; *McAdow v. Black*, 6 Mont. 601; s. c. 13 Pac. Repr. 357; *Webster v. VanSteenburg*, 46 Barb. 211; *Funk v. Paul*, 64 Wis. 35; s. c. 54 Am. Rep. 576; 24 N. W. Repr. 419; *Buffington v. Garrish*, 15 Mass. 156; *Johnson v. Graves*, 27 Ark. 557; *Ashton's Appeal*, 73 Pa. St. 153, 162; *Halstead v. Bk. of Kentucky*, 4 J. J. Marsh. 554; *Harris v. Horner*, 1 Dev. & B. 445; s. c. 30 Am. Dec. 182; *Chance v. McWhorter*, 26 Ga. 315; *Repp v. Repp*, 12 Gill & J. 341; *Sweeney v. Bixler*, 69 Ala. 539; *Van-Henzen v. Radcliff*, 17 N. Y. 580; s. c. 72 Am. Dec. 480; *People's Sav. Bk. v. Bates*, 120 U. S. 556; s. c. 7 Sup. Ct. Repr. 679; *Withers v. Little*, 56 Cal. 370; *Padgett v. Lawrence*, 10 Paige, 170; s. c. 40 Am. Dec. 272; *Clarke v. Barnes*, 72 Iowa, 563; 34 N. W. Repr. 419; *Tiffany v. Warren*, 37 Barb. 571.

² *Overstreet v. Manning*, 67 Tex. 657; s. c. 4 S. W. Repr. 248.

³ *McKamey v. Thorpe*, 61 Tex. 648, 653; *Wright v. Douglass*, 10 Barb. 107; *Dickerson v. Tillinghast*, *supra*.

⁴ *Hunter v. Watson*, 12 Cal. 373; s. c. 73 Am. Dec. 543; *Cammack v. Soran*, 30 Gratt. 292, 295; *Exchange Bk. v. Knox*, 19 Gratt. 739; *Evans v. Greenhow*, 15 Gratt. 153; *Fry v. Clifford*, 44 Cal. 335; *Partridge v. Smith*, 2 Biss. 183, 187; *Bayley v. Greenleaf*, 7 Wheat. 46; *Metford v. Metford*, 9 Ves. 100; *Babcock v. Jordan*, 24 Ind. 14; *Gassen v. Hendrick*, 74 Cal. 444; s. c. 16 Pac. Repr. 242; *Work v. Brayton*, 5 Ind.

§208. Extension of Time—Surrender of Security, and the Like.

While the satisfaction or security of a pre-existing debt is not alone, under the general rule, a valuable consideration within the meaning of the recording acts, yet if the creditor, in connection therewith, has been induced by the transaction to change his position for the worse, the rule is different, and the claim of valuable consideration may be sustained.¹ Thus, the surrender or cancellation of a security held by the creditor will be sufficient.² So, the giving of an extension of time, however short, upon the debt, is a valuable consideration for a mortgage taken as security.³ By

396; 2 Story's Eq. Jur. 657; Soule v. Shotwell, 52 Miss. 236; Ruth v. Ford, 9 Kan. 17; City Bank v. Goodrich, 3 Colo. 139; Wert v. Naylor, 93 Ind. 431. The later Indiana cases qualify the earlier to the extent of requiring an extension of time or surrender of some security. Gilchrist v. Gough, 63 Ind. 576; s. c. 30 Am. Rep. 250.

Where a second mortgage of chattels is for a pre-existing debt, but the mortgagee enters into possession and assumes control of the business connected therewith, the responsibility thus assumed becomes a valuable present consideration. Clark v. Barnes, 72 Iowa 563; s. c. 34 N. W. Repr. 419, citing Trustees v. Hill, 12 Iowa, 462; Ryan v. Chew, 13 Id. 589.

In a few states a distinction is made between cases where the second conveyance is taken as security for an antecedent debt, and cases where it is taken in absolute discharge of the debt; and in the latter, though not in the former instance, it is held to constitute valuable consideration. Compare with cases cited in the preceding notes to this section, Saffold v. Wade, 51 Ala. 214; Ohio Co. v. Ledyard, 8 Ala. 866; Mobile Co. v. Randall, 71 Ala. 220; Boon v. Barnes, 23 Miss. 136; Love v. Taylor, 26 Miss. 567; Upshaw v. Hargrove, 6 Sm. & Mar. 286, 292; Donaldson v. Bank, 1 Dev. Eq. 103.

The rule requiring the actual payment of the consideration does not apply to any but the original purchaser from the person from whom both parties claim; the subsequent purchaser being protected by virtue of his immediate grantor's title. Webster v. VanSteenburg, 46 Barb. 211; ante, §155.

¹ Steffian v. Bank, 69 Tex. 517; s. c. 6 S.W. Repr. 823; Dickerson v. Tillinghast, 1 Paige, 214; s. c. 25 Am. Dec. 528; VanHeusen v. Radcliff, 17 N. Y. 580; s. c. 72 Am. Dec. 480; Roxborough v. Messick, 6 O. St. 548; s. c. 67 Am. Dec. 346; McLeod v. First National Bk. 42 Miss. 99; Munn v. McDonald, 10 Watts, 270; Farmers' Bank v. Wallace, 45 O. St. 153; s. c. 12 N. E. Repr. 439.

² Padgett v. Lawrence, 10 Paige, 170; s. c. 40 Am. Dec. 272; Goodman v. Simonds, 20 How. (U. S.), 343, 371; Youngs v. Lee, 12 N. Y. 551; Spurlock v. Sullivan, 36 Tex. 511.

³ Gilchrist v. Gough, 63 Ind. 576; s. c. 30 Am. Rep. 250; 19 Alb. Law Jour. 276; Busenborke v. Ramey, 53 Ind. 499; Thames v. Rembert,

extending the time of payment the creditor yields up for a season his right of action, which is a privilege deemed of value in law, and sufficient to support the claim of an innocent purchaser.¹

§209. Mortgagee a Purchaser.

It is settled by statute in some states, and by judicial decision in most others, that a mortgagee is a purchaser within the meaning of the recording acts.² The proposition is subject to the qualification that where the mortgage is to secure a pre-existing debt, and such debt is not, of itself alone, recognized as a valuable consideration, then the mortgagee must have given an extension of time, or surrendered some security, or otherwise brought himself within the definition of a purchaser for value under the recording acts.³ As to an assignee of a mortgage, the rule is not quite so well settled. In a considerable number of

63 Ala. 561; *Griswold v. Davis*, 31 Vt. 390; *Hale v. Omaha Bank*, 33 N. Y. Sup. Ct. 40; *Bay v. Coddington*, 20 Johns. 637; s. c. 11 Am. Dec. 342; *Port v. Embree*, 54 Iowa, 14; *Ingram v. Morgan*, 4 Humph. 66; *Schumpert v. Dillard*, 55 Miss. 348; *Sargent v. Sturm*, 22 Cal. 359; *Farmers' Bk. v. Wallace*, *supra*; *Downing v. Blair*, 75 Ala. 216.

¹ *Steffan v. Bank*, 69 Tex. 513, 517; *Cook v. Parham*, 63 Ala. 456; *Whitfield v. Riddle*, 78 Ala. 99; but see *Pepper v. George*, 51 Ala. 190.

² *Steffan v. Bank*, 69 Tex. 513, 515; *Huffman v. Blum*, 64 Tex. 334; *Fargason v. Edrington*, 49 Ark. 207, 214; s. c. 4 S.W. Repr. 763; *Seever v. Delashmut*, 11 Iowa, 174; s. c. 77 Am. Dec. 179; *Welton v. Tizzard*, 15 Iowa, 495; *Cook v. Parham*, 63 Ala. 456; *Halbert v. McCulloch*, 3 Met. 456; *Dickerson v. Tillinghast*, 1 Paige, 214; s. c. 25 Am. Dec. 528; *Moore v. Walker*, 3 Lea, 656; *Chapman v. Miller*, 130 Mass. 289; *Haynsworth v. Bischoff*, 6 S. Car. 159; *Weinberg v. Rempe*, 15 W. Va. 829; *Brophy v. Brophy*, 15 Nev. 101; *Pierce v. Faunce*, 47 Me. 507; *Stockton v. Craddick*, 4 La. Ann. 282; *Martin v. Jackson*, 27 Pa. St. 504; *Salter v. Baker*, 54 Cal. 140; *Jordan v. McNeill*, 25 Kan. 459; *Singer v. Chalmers*, 2 Utah, 542; *Willoughby v. Willoughby*, 1 T. R. 763; *Bailey v. Crim*, 9 Biss. 95; *Keith v. Bingham (Mo.)*, 10 S. W. Repr. 32.

³ *Gilchrist v. Gough*, 63 Ind. 576; s. c. 30 Am. Rep. 250; *Busenborke v. Ramey*, 53 Ind. 499; *Carey v. White*, 52 N. Y. 138; *Ashton's Appeal*, 73 Pa. St. 153. And for instances in which a mortgagee will not be considered a purchaser, see further, *James v. Morey*, 2 Cow. 246; s. c. 14 Am. Dec. 475; *Berry v. Mut. Ins. Co.*, 2 Johns. Ch. 612; *Searing v. Brinkerhoff*, 5 *Id.* 331; *Van Rensaeller v. Sheriff*, 1 Cow. 801; *Bybee v. Hawsett*, 12 Fed. Repr. 649.

the states assignments of mortgages are expressly placed within the recording acts;¹ but where this has not been done, it is held in many cases that such an assignee is not a purchaser within the meaning of the registry laws;² while in others it is held by judicial interpretation that such an assignment is a conveyance within the meaning of the registry law.³ In Alabama it has been held that a mortgagee whose mortgage is tainted with usury is not a *bona fide* purchaser; and in Georgia, that the record of an absolute deed which fails, under the statute, to pass the legal title on account of usury, is not notice of the instrument as an equitable mortgage such as to postpone a junior judgment lien.⁴

§210. Trustee a Purchaser.

A deed of trust is technically a deed,⁵ and is now generally considered in legal effect as a mortgage with power of sale.⁶ The trustee, unless he be a trustee for the benefit of creditors generally, is regarded as a purchaser for value,

¹ See *ante*, §33, and authorities there cited; also, §§174, 203.

² The Conn. Co. v. Talbot, 113 Ind. 373; s. c. 3 Am. St. Rep. 655; 14 N. E. Repr. 586; Dixon v. Hunter, 57 Ind. 278; Watson v. Dundee, 12 Or. 474; s. c. 8 Pac. Repr. 548; Oregon Trust Co. v. Shaw, 5 Sawy. 336; Gordon v. Rixley, 76 Va. 694, 701.

³ Pepper's Appeal, 77 Pa. St. 373; Purdy v. Huntington, 46 Barb. 389; s. c. 1 Am. St. Rep. 532; Neider v. Pennypacker, 9 Phila. 86; Westbrook v. Gleason, 79 N. Y. 23; Phillips v. Bank, 18 Pa. St. 394, 401; St. John v. Spalding, 1 Thomp. & C. (N. Y.), 483; Smith v. Knickerbocker, 84 N. Y. 589; Stein v. Sullivan, 31 N. J. Eq. 409; McCormick v. Bauer, 122 Ill. 573; s. c. 13 N. E. Repr. 852; Bowling v. Cook, 39 Iowa, 200; Smith v. Keohane, 6 Bradw. (Ill.), 585; and other cases cited in 1 Jones on Mort., §§472-478.

In New York powers of attorney to assign a mortgage, and to collect and discharge it, have been held to be not within the recording acts. Williams v. Birbeck, Hoffm. 359; Jackson v. Richards, 6 Cow. 617.

⁴ McCall v. Rogers, 77 Ala. 349; Johnson v. Wheelock, 63 Ga. 623; Code Ga., §2024. Such a deed will not be regarded as an equitable mortgage. Broach v. Smith, 75 Ga. 159; overruling Bullard v. Long, 68 Ga. 821, and Sugart v. Mays, 54 Ga. 554.

⁵ Branch v. Atlantic, etc., Ry. Co., 3 Woods, 481, *ante*, §35.

⁶ Jackson v. Harby, 65 Tex. 710; McLane v. Paschal, 47 Tex. 365; Baldwin v. Peet, 22 Tex. 718; Flint v. Auditor Gen. 41 Mich. 635; Sargent v. Howe, 21 Ill. 148; Turner v. Watkins, 31 Ark. 429; Webb v. Hoselton, 4 Neb. 308; Woodruff v. Robb, 19 Ohio, 212; Bennett v.

and holds the property free from prior claims, equities and secret trusts of which he had no notice at the time of the conveyance.¹ Statutes relating to the recording of mortgages embrace deeds of trust without special mention of the latter, as also do those relating to powers of sale contained in mortgages.² Notice to the trustee of fraud on the part of the grantor in executing the trust deed is notice to the *cestui que trust*.³ Deeds of trust are unknown to the Louisiana system, and in that state the record of a deed of trust in the book of mortgages has been held to give it no priority over a subsequently recorded mortgage.⁴

Union Bank, 5 Humph. 612; Newman v. Samuels, 17 Iowa, 528; Wright v. Bundy, 11 Ind. 398; Lenox v. Reed, 12 Kan. 223.

But while a mortgage with power of sale may be assigned, in the absence of words restricting an assignment, and the power of sale passes thereby, a deed of trust to secure a debt, being a confidence reposed, cannot be delegated, and no assignment is possible without an express and positive permission in the deed. 2 Pom. Eq. Jur., §995, citing Whittlesey v. Hughes, 39 Mo. 13; Pickett v. Jones, 63 Mo. 195, 199.

A deed of trust is not by all the courts regarded as a mortgage. Thibodeaux v. Anderson, 34 La. Ann. 797; Grant v. Burr, 54 Cal. 298; Wilkins v. Wright, 6 McLean, 340; Bank of Commerce v. Lanahan, 45 Md. 396, and other cases cited in 2 Pom. Eq. Jur., §995, from which I have borrowed for this section.

¹ Fargason v. Edrington, 49 Ark. 207, 214; s. c. 4 S. W. Repr. 763; Gherson v. Pool, 31 Ark. 85; Gilchirst v. Gough, 63 Ind. 576; s. c. 30 Am. Rep. 250; Wickham v. Lewis, 13 Gratt. 427; Cook v. Parham, 63 Ala. 456; Kesner v. Trigg, 98 U. S. 50; Schumpert v. Dillard, 55 Miss. 348; Post v. Embree, 54 Iowa, 14; s. c. 6 N. W. Repr. 83.

² 2 Pom. Eq. Jur., §995, citing Crosby v. Huston, 1 Tex. 203, 239; Woodruff v. Robb, 19 Ohio, 212; Magee v. Carpenter, 4 Ala. 469; Wood v. Lake, 62 Ala. 489; Schultze v. Houfes, 96 Ill. 335; Farrar v. Payne, 73 Ill. 82; Martin v. Reed, 30 Ind. 218; Pope v. Durant, 26 Iowa. 233; Lyons v. Field, 17 B. Mon. 543; Tatum v. Holliday, 59 Mo. 422; Elliott v. Wood, 45 N. Y. 71; s. c. 53 Barb. 285; Caldwell v. Bowen, 4 Sneed, 415, and other cases, besides numerous statutes.

³ Pope v. Pope, 40 Miss. 516. If the deed of trust be to provide for the payment of creditors generally, the trustee in such case is subject to the law applicable to an assignee for the benefit of creditors, as given in the next section.

Where a subsequent purchaser has actual notice of a trust affecting the property, he takes subject to it. Minton v. Pickens, 24 S. Car. 592; Zimmerman v. Kinkle, 108 N. Y. 282; s. c. 15 N. E. Repr. 407; 11 Cent. Repr. 118; Jones v. Shaddock, 41 Ala. 362; West v. Fitz, 109 Ill. 425; Daniels v. Davidson, 16 Beav., Sr., 249; Liggett v. Wall, 2 A. K. Marsh. 149; Oliver v. Piatt, 3 How. (44 U. S.), 333.

⁴ Thibodeaux v. Anderson, 37 La. Ann. 797. In this case the court clearly defines the difference between a common law mortgage, and one

§211. Assignee for Benefit of Creditors not a Purchaser.

An assignment for the benefit of creditors generally, being a transaction which has solely in view the satisfaction of antecedent indebtedness, the assignee, under the general rule already stated, is not a purchaser for value, and as against prior equities, he occupies no better position with respect to the property conveyed than the creditors themselves, whose claims not secured by lien, must yield to an unrecorded conveyance of specific property, or other equity of the kind.¹ Nor has such an assignee the right, unless the power be expressly conferred by statute, to attack a prior deed or mortgage by the assignor on the ground that it was made in fraud of creditors.² Where, as by the terms of the statutes of a few states, an unrecorded mortgage is made absolutely void as against third parties, it is not good against an assignee for the benefit of creditors.³

under the Louisiana system; and Mr. Justice Todd, in his dissenting opinion, cites a number of cases in which deeds of trust have there been treated as mortgages. *Hutchins v. Field*, 10 La. Ann. 237; *Watson v. James*, 15 *Id.* 3-6.

¹ *Keller v. Smalley*, 63 Tex. 519; *Harris v. Horner*, 1 Dev. & B. Eq. 455; s. c. 30 Am. Dec. 182; *Williams v. Windsor*, 12 R. I. 9; *Roberts v. Austin*, 2; *Iowa*, 327; *In re Collins*, 12 Blatch. 548; *Pierson v. Manning*, 2 Mich. 464; *Tyler v. Aberg*, 65 Md. 18; s. c. 2 Cent. Repr. 851; 3 Atl. Repr. 904; *Rateliff v. Longston*, 18 Md. 391; *Spackman v. Ott*, 65 Pa. St. 131; *Joslin v. Cowee*, 60 Barb. 48; *Clark v. Flint*, 22 Pick. 231; s. c. 33 Am. Dec. 733; *Willis v. Henderson*, 4 Scam. 13; *Van Heusen v. Radcliff*, 17 N. Y. 28; s. c. 72 Am. Dec. 480; *Burrill on Assignments*, 391; *Heinrichs v. Wood*, 7 Mo. App. 236; *Peet v. Spencer*, 90 Mo. 384; s. c. 3 S. W. Repr. 434.

² *Stewart v. Platt*, 101 U. S. 735; *Clapp v. Nordmeyer*, 25 Fed. Repr. 71; *Keller v. Smalley*, 63 Tex. 520; *Browell v. Curtis*, 10 Paige, 217; *Estabrook v. Messersmith*, 18 Wis. 551; *Walker v. Miller*, 11 Ala. 1081. But see, *contra*, *Hanes v. Tiffany*, 25 O. St. 549; *Goodrich v. Michael*, 3 Colo. 77; *Bridgeford v. Adams*, 45 Ark. 136. The statute may confer such right. *Southard v. Benner*, 72 N. Y. 427; *Barton v. Hosner*, 24 Hun. 468; *Cady v. Whaling*, 7 Biss. 434; but without such statute even a creditor who recovers judgment against the assignor, after the making of a valid assignment, cannot challenge a previous disposition of property by the assignor. *Sullivan v. Miller*, 40 Hun. 516.

³ *Bloom v. Noggle*, 4 O. St. 45; *Erwin v. Shuey*, 8 O. St. 509. It has been held in Ohio that the invalidity of a mortgage because of the absence therefrom of a statutory affidavit of liability, could be claimed

§212. Purchaser at Execution Sale Protected.

The fact that a sale is made under execution or other judicial process does not, of itself, deprive the buyer thereof of the protection accorded to a *bona fide* purchaser.¹ Whether he is to be regarded as such or not, will depend on the application of the principles already stated. If under the registry statute the lien of the judgment is made superior to an unrecorded conveyance or an equitable interest not of record, the purchaser, because of the priority accorded to the lien, will be protected though he has actual notice, if the judgment creditor had none when his lien attached.² And if the creditor had notice, or if the judgment lien be not given precedence, yet if the purchaser had no

by an assignee in trust for the benefit of creditors. *Hanes v. Tiffany*, 25 O. St. 549.

In Tennessee an assignment for the benefit of creditors has preference, it seems, over an unrecorded deed, if taken without actual notice. *Nailer v. Young*, 7 Lea. 737; *Sharp v. Fly*, 9 Baxt. 5; and in Virginia where the rights of creditors receive the fullest measure of protection, such an assignee is a *bona fide* purchaser for value. *Gregg v. Sloan*, 76 Va. 497, 499; *Williams v. Lord*, 75 Va. 390, 404; as also in Arkansas, *Bridgeford v. Adams*, 45 Ark. 136; and see also, *Goodrich v. Michael*, 3 Colo. 77.

In New York the fact that the statute of assignments requires the record of a deed of assignment in the office of the county clerk, will not, where it embraces real estate, exempt it from the operation of the registry laws requiring its record in the office of the register of deeds. *Wagner v. Hodge*, 34 Hun. (41 N. Y. Sup. Ct.), 524. Notice to the assignee, of circumstances attending the execution of the deed, held not notice to the creditors. *Brooks v. Marbury*, 11 Wheat. 78.

¹ *Holmes v. Buckner*, 67 Tex. 107, 112; *Davis v. Gaines*, 104 U. S. 386; *Halloway v. Platner*, 20 Iowa, 121; s. c. 89 Am. Dec. 517; *McKnight v. Gordon*, 13 Rich. Eq. 222; s. c. 94 Am. Dec. 164; *Scribner v. Lockwood*, 9 Ohio, 184; *Foorman v. Wallace*, 75 Cal. 552.

² *Wood v. Chapin*, 13 N. Y. 509; s. c. 67 Am. Dec. 62; *Grace v. Wade*, 45 Tex. 527; *Nugent v. Priebatsch*, 61 Miss. 402; *Calder v. Chapman*, 52 Pa. St. 359; *Smith v. Jordan*, 25 Ga. 687; *Guiteau v. Wisely*, 47 Ill. 433; *Potter v. McDowell*, 43 Mo. 93; *Fash v. Raviesies*, 32 Ala. 451; *Greenleaf v. Edes*, 2 Minn. 264; *Sharp v. Shea*, 32 N. J. Eq. (6 Stew.) 43; *Condit v. Wilson*, 36 N. J. Eq. 370.

In Mississippi the rule is applied in favor of the judgment lien, although, aside from this, a purchaser at execution sale is not there regarded as a *bona fide* purchaser for value. *Nugent v. Priebatsch*, 61 Miss. 402; citing *Loughridge v. Bowland*, 52 Miss. 546; *Duke v. Clark*, 58 Miss. 465, and overruling *Simmons v. North*, 3 Sm. & M. 67.

notice at the time he bought, he will be protected under the general rule, just as though he had bought at voluntary sale directly from the debtor.¹ But if the creditor had notice when his lien attached; or if, under the rule of equity, unaffected by registry statute, the judgment lien is inferior to a prior unrecorded conveyance or right, even without notice thereof, then one who receives notice of such prior right or claim, at or before he purchases under the judgment, takes subject to it, and is not a *bona fide* purchaser.² Aside from any and all question of notice, a purchaser at execution sale is not regarded, by some of the courts, as a *bona fide* purchaser entitled to protection.³

§213. Purchaser at Bankrupt Sale Not Protected.

The general rule protecting an execution purchaser does not apply to a purchaser at bankrupt sale. An assignee in bankruptcy or insolvency takes only the debtor's rights, in

¹ Ayres v. Duprey, 27 Tex. 593, 605; s. c. 86 Am. Dec. 657; Holmes v. Buckner, 67 Tex. 112; s. c. 2 S. W. Repr. 452; Rev. Stats. Tex., §2318; Sieman v. Schurck, 29 N. Y. 523; Miles v. King, 5 S. Car. 146; Paine v. Mooreland, 15 Ohio, 435; Den v. Richman, 1 Green, 43; Ehle v. Brown, 31 Wis. 405; Ohio Life Co. v. Ledyard, 8 Ala. 866; Runyan v. McClelland, 24 Ind. 165; Morrison v. Funk, 23 Pa. St. 421; Fords v. Vance, 17 Iowa, 94; Cooper v. Blakey, 10 Ga. 263; Hosier v. Hall, 2 Ind. 556; s. c. 54 Am. Dec. 460; McNitt v. Turner, 16 Wall. 352.

² First Nat'l Bank v. Hayzlett, 40 Iowa, 659; Righter v. Forrester, 11 Bush, 278; Burn v. Burn, 3 Ves. 582; Pixley v. Huggins, 15 Cal. 127; Holden v. Garrett, 23 Kan. 98; Orth v. Jennings, 8 Blackf. 420; Kelly v. Mills, 41 Miss. 267; Jackson v. Dubois, 4 Johns. 216.

³ Polk v. Gallant, 2 Dev. & Bat. Eq. 395; s. c. 34 Am. Dec. 395; Draper v. Bryson, 26 Mo. 108; s. c. 69 Am. Dec. 483; Taylor v. Lowenstein, 50 Miss. 278; Walker v. Moody, 65 N. C. 599; Hart v. Felder, 4 Desaus' Eq. 202. Especially if he be the judgment creditor. Dickerson v. Tillinghast, 4 Paige, 215; s. c. 25 Am. Dec. 528; Sargent v. Sturm, 23 Cal. 359; Vatie v. Lytle, 7 Ohio, 477; Wright v. Douglass, 10 Barb. 97; *contra*, Wallace v. Campbell, 54 Tex. 87; Newman v. Davis (Ark.), 24 Fed Repr. 609.

The purchaser is in all cases chargeable with notice whether the court had jurisdiction to render the judgment. Stegall v. Huff, 54 Tex. 193; Collins v. Miller, 64 Tex. 118.

In Colorado, under statute giving priority to the deed first recorded, a purchaser at sheriff's sale, though he be the judgment creditor, is protected if his certificate of sale is recorded before the prior deed from the debtor. McMurtrie v. Riddell, 9 Colo. 497; s. c. 14 Pac. Repr. 181.

the absence of fraud in fact; and consequently is affected with all the claims, liens and equities which would affect the debtor if he were himself asserting his interest in the property.¹ The assignee gains no rights over those possessed by the bankrupt, by reason of the assignment; hence an unrecorded prior conveyance, valid between the parties, is valid against the grantor's assignee.² The rule of *caveat emptor* applies to bankrupt sales, and the purchaser takes the property subject to all the equities with which it was chargeable in the hands of the bankrupt.³ An exception to the rule as to the rights of the assignee exists in cases of fraud; in this respect he is so far considered as representing the rights of the creditors that any conveyance which would be void for fraud as against general creditors, will be void against the assignee.⁴ In some cases this view that the assignee, as representing the creditors, has a stronger right than the bankrupt, has been pushed further, and the assignee permitted to contest other rights and claims to the property which the bankrupt could not contest, and upon other grounds than fraud.⁵

¹ Renick v. Dawson, 55 Tex. 102; Stewart v. Platt, 101 U. S. 731; Nat'l Bank v. Conway, 14 Nat. Bank Reg. 513; s. c. 1 Hughes, 37; *In re Griffiths*, 1 Lowell, 431; Fletcher v. Morey, 2 Story, 555.

This is the rule recognized also in England. Mitford v. Mitford, 9 Ves. 87; Sherrington v. Yates, 12 Mees. & Wel. 855; Brown v. Heathcote, 1 Atk. 160; Jones on Chat. Mort., §241.

² *In re Collins*, 12 Blatch. 548, 552; s. c. 12 N. B. R. 379; Mitchell v. Winslow, 2 Story, 630; Yeatman v. Savings Institution, 95 U. S. 764; Johnson v. Patterson, 2 Woods, 443; *In re Bruce*, 16 Nat. B. Reg. 318; Coggeshall v. Potter, 1 Holmes, 75; s. c. 4 N. B. Reg. 73; Shawhan v. Wherritt, 7 How. 627.

³ Renick v. Dawson, 55 Tex. 102; Fletcher v. Ellison, 1 Tex. Un. Cas. 661; McKiernan v. Fletcher, 2 La. Ann. 438; Baker v. Vining, 30 Me. 21; Anderson v. Miller, 15 Miss. (Sm. & M.), 586; Bump on Bank'cy (9th ed.), 471, 484.

⁴ Winsor v. McClelland, 2 Story, 492; *In re Wynne*, Chase's Dec. 227, 250; *In re Collins*, 8 Ben. 59, 60; s. c. 12 Nat. B. Reg. 379; Bank v. Hunt, 11 Wall. 391.

⁵ Moore v. Young, 4 Biss. 128, 135, construing statute of Indiana; Harvey v. Crane, 2 Biss. 496; Goodrich v. Michael, 3 Colo. 77; *In re Werner*, 5 Dill. 119; Bingham v. Jordan, 1 Allen, 373; Lockwood v. Slevin, 26 Ind. 124; *In re Gurney*, 7 Biss. 414.

§214. Purchaser of Same Property from Same Grantor.

The purchaser who is protected by the recording acts must be a purchaser from the grantor in the prior unrecorded conveyance; but it is not meant by this that he must have purchased directly from such grantor himself. He is within the meaning and spirit of the law if he is a purchaser in the subsequent line of title under such grantor.¹ Nor is it necessary to his protection that all the intermediate conveyances forming his chain of title should be recorded.² The subsequent purchaser as to whom an unrecorded deed is void is a subsequent purchaser of the same subject or tract from the same vendor, and not a purchaser of a different tract; and one subsequent purchaser cannot invoke this provision as against another purchaser in order to primarily subject the tract bought by the other to the satisfaction of a judgment lien existing when both purchases were made.³ In Virginia it is held that an assignee of a mortgage, or of purchase money notes, is not a purchaser of the real estate, and as the statute has not provided for the record of transfers of choses in action, such

¹ *Fallas v. Pierce*, 30 Wis. 443; *Flynt v. Arnold*, 2 Metc. 619. A contrary view seems to have been advanced in *Raynor v. Wilson*, 6 Hill, 469; but if this were correct, then the notice imparted by the record would not extend beyond the first purchaser, and the many decisions that the record protects subsequent purchasers in the same line of title, would not be sound in principle. See *ante*, §162.

² *Wood v. Chapin*, 13 N. Y. 509, 515; s. c. 67 Am. Dec. 52.

Where the statute gives priority to a subsequent deed only where it is first recorded, such prior record is usually held essential to the protection of the subsequent purchaser. *Mansfield v. Gregory*, 8 Neb. 432; s. c. 9 N. W. Repr. 87; *McMurtrie v. Riddell*, 9 Colo. 497; s. c. 14 Pac. Repr. 181.

³ *Herman v. Oberdorfer*, 33 Gratt. 497. Several lots of land were sold by the vendor on the same day, and same terms, to several parties, all of whom were immediately put into possession under the same agreement as to the deeds to be made to them. Although the deeds are then afterwards really delivered and recorded at different times, they will all be regarded as of the same date, in subjecting them to the lien of a judgment docketed at the time of the sale; and the rule subjecting them in the inverse order of alienation has no application. *Id.*, citing *Horton v. Bond*, 28 Gratt. 815.

a purchaser is not protected.¹ The rules under which, in a large majority of the states, such a purchaser is protected, have been already considered.²

¹ *Gordon v. Rixley*, 76 Va. 694, 701, citing *Gregg v. Sloan*, 76 Va. 497; *Kirkland v. Brune*, 31 Gratt. 126.

² See as to vendor's lien, *ante*, §§19, 20, 172; and as to assignments of mortgages, §§33, 174, 203, 209.

A duly recorded voluntary conveyance not void as to subsequent creditors. Art. 2466, Rev. Stats. of Texas, provides that every conveyance "made by a debtor which is not upon consideration deemed valuable in law, shall be void as to prior creditors, unless it appears that such debtor was then possessed of property within this state subject to execution, sufficient to pay his existing debts; but such conveyance shall not on that account merely be void as to subsequent creditors, and though it be decreed to be void as to prior creditors, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers." The use of the word "merely" in the statute is held to indicate that cases might arise in which a voluntary conveyance should be held void even as to subsequent creditors; as where a grantor voluntarily conveys to his wife or children, and causes the deed to be withheld from the record, intending thereby to obtain credit upon faith of still being owner of the property conveyed, and does obtain such credit. This would present a strong case for holding the conveyance fraudulent, although it might be placed on record before the creditor secured a lien upon the property by judgment or otherwise.

But in this case the voluntary deed from Simon to his wife was placed upon record the day of its execution, and notice was given to the world that the grantor had parted with his title to the property; hence the general rule is applied, that "a subsequent creditor who acquired his claim with knowledge or notice of the conveyance sought to be annulled cannot attack it as fraudulent;" citing *Wait's Fraud. Conv.*, §106; *Baker v. Gilman*, 52 Barb. 39; *Lehmberg v. Biberstein*, 51 Tex. 457; *DeGarcia v. Galvan*, 55 Tex. 53; *Van Bibber v. Mathis*, 52 Tex. 406. Evidence that Simon was at the time of the voluntary conveyance indebted in an amount in excess of the value of his assets, and soon thereafter began operating and speculating upon a larger scale than before, and shortly became insolvent, held not to take the case out of the general rule. *Lewis v. Simon*, 72 Tex. 470; and to same effect, see *Kane v. Roberts*, 40 Md. 590; *Williams v. Banks*, 11 Md. 250; *ante*, §194.

CHAPTER 9.

ACTUAL NOTICE.

- §215. Origin of the doctrine of actual notice.
- 216. The equity of the rule prevails.
- 217. Exceptions to the rule.
- 218. Continued.
- 219. The several kinds of actual notice.
- 220. Continued—Degrees of notice.
- 221. Constructive and implied notice.
- 222. Statutory distinctions as to actual notice.
- 223. Putting on inquiry.
- 224. Sources of information.
- 225. Vague statements and rumors.
- 226. Inquiry to be prosecuted.
- 227. Presumption of notice rebuttable.
- 228. Possession as notice.
- 229. Exceptions to the rule.
- 230. Grantor remaining in possession.
- 231. Grantor's possession is notice.
- 232. Possession referred to record title.
- 233. Possession must be open and notorious.
- 234. Possession must be actual.
- 235. Joint possession as notice.
- 236. Possession by tenant is notice.
- 237. Possession must be existing and continuous.
- 238. Notice to agent is notice to principal.
- 239. Scope of rule—Partners, trustees, officers, *etc.*
- 240. Character of the agency.
- 241. Notice in same transaction.
- 242. Agent acting for both parties and for his own benefit.
- 243. Where agent is guilty of fraud.
- 244. Notice to officers and agents of corporations.

§215. Origin of the Doctrine⁸ of Actual Notice.

The rule that actual notice of an unrecorded conveyance is in its effect equivalent to a registry of the instrument, is nearly as old as the registry law itself. The statute of 7th Anne, quoted in the first section of this work, gave priority

to conveyances according to the priority of their record, without any proviso that the subsequent conveyance that might be first recorded, should have been taken without notice or knowledge of the earlier one. But the preamble of the statute recites that it was enacted for the prevention of fraud, and this purpose is further evidenced by the language used in the body of the act declaring that an unregistered conveyance should be adjudged "fraudulent and void" as against a subsequent one first duly registered. These suggestions of the intent of the law led the English courts of equity at an early day to declare the rule that a purchaser with actual knowledge or notice of a prior conveyance of the property, not registered, took subject thereto. "The ground of it," said Lord Hardwicke, "is plainly this, that the taking of a legal estate after notice of a prior right makes a person a *mala fide* purchaser, and not that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate."¹

§216. The Equity of the Rule Prevails Over its Disadvantages.

The policy of admitting evidence of actual notice to determine the right of priority is attended with all the dangers and uncertainties incident to parol evidence when used for the purpose of affecting written instruments and disturbing titles;² and for this reason an expression of regret is to be found in some of the English cases that the courts should ever have suffered the question of actual notice to be ag-

¹ *LeNeve v. LeNeve*, Amb. 436; s. c. 1 Ves. 64; 3 Atk. 646, and given also, with very full notes, in 2 Eq. Lead. Cases (*White & Tudor*, 4 Am. ed.), 113-119.

² *Bloom v. Noggle*, 4 O. St. 45. As to the impolicy of admitting parol evidence to vary or impeach the certificate of acknowledgment, see *Canal Co. v. Russell*, 68 Ill. 426; *Donohue v. Mills*, 41 Ark. 421; *ante*, §§87-90.

itated against one whose conveyance is duly recorded.¹ In thus engrafting upon the registration law exceptions to its literal import and application in order to meet the equitable consequences of actual notice and prevent a fraudulent use of the statute, the courts have seriously broken in upon the symmetry and impaired the effectiveness of the registry system; but an unwillingness to tolerate fraud, or to permit advantage to be taken of the law to obtain an unfair priority, has so far, with but a limited exception, continued to prevail over these objections.² The rule declared by Lord Hardwicke has been almost universally adopted both by judicial construction of our courts, and by the express terms of many of our American statutes.³

¹ Wyatt v. Barwell, 19 Ves. 439; Ford v. White, 16 Beav. 120; Benham v. Keane, 1 John. & H. 685.

² Hine v. Dodd, 2 Atk. 275; Davis v. Strathmore, 16 Ves. 419; Cheval v. Nichols, 1 Stra. 664; Lloyd v. Banks, L. R. 3 Ch. App. 488; Rolland v. Hart, L. R., 6 Ch. App. 678; Tunstall v. Trappes, 3 Sim. 287; Harrington v. Allen, 48 Miss. 492.

While the rule is intended to prevent fraud, it yet, on the other hand, necessarily opens wide the door to fraud and perjury on the part of those assailing the record by parol evidence usually of interested parties. The doctrine of constructive notice, declares Justice Campbell, of the Michigan Court, has been carried so far as to work fraud nearly as often as it prevents it. Allen v. Cadwell, 55 Mich. 8; s. c. 20 N. W. Repr. 692. As to mortgages it has been said that vigilance in recording them is as much entitled to the reward of priority as vigilance in obtaining them. Mayham v. Coombs, 14 Ohio, 428; Moore v. Thomas, 1 Or. 201; Bank v. Manufacturing Co., 96 N. C. 298; s. c. 3 S. E. Repr. 363.

³ Portis v. Hill, 30 Tex. 529; s. c. 98 Am. Dec. 481; Blalock v. Newhill, 78 Ga. 245; Smith v. Proffatt, 82 Va. 832, 851; s. c. 1 S. E. Repr. 67; Effinger v. Hall, 81 Va. 94; Manandas v. Mann, 14 Or. 450; s. c. 13 Pac. Repr. 449; Strohm v. Good, 113 Ind. 93; s. c. 14 N. E. Repr. 901; Petry v. Ambroscher, 100 Ind. 510; Morris v. White, 36 N. J. Eq. 324; Phiifer v. Burnhart, 88 N. C. 333; Hodges v. Spicer, 79 N. C. 223; Frostburg v. Hamill, 55 Md. 313; Gen. Ins. Co. v. U. S. Ins. Co., 10 Md. 517; s. c. 69 Am. Dec. 174; Littleton v. Giddings, 47 Tex. 109; Dillon v. Shugar, 73 Iowa, 434; s. c. 35 N. W. Repr. 509; Brown v. Hanauer, 48 Ark. 551; s. c. 3 S. W. Repr. 27; Butcher v. Yocum, 61 Pa. St. 168; s. c. 100 Am. Dec. 625; Lahr's Appeal, 90 Pa. St. 507; Allen v. Poole, 54 Miss. 323; Deason v. Taylor, 53 Miss. 697; Hoit v. Russel, 56 N. H. 559; VanKeuren v. Cent. Ry. Co., 38 N. J. L. 165; Dunham v. Dey, 15 Johns. 555; s. c. 8 Am. Dec. 282; Howard Ins. Co. v. Halsey 8 N. Y. 271; s. c. 59 Am. Dec. 478; Tuttle v. Jackson, 6 Wend. 213; s. c. 21 Am. Dec.

§217. Exceptions to the Rule.

The equitable doctrine that actual notice supplies registration is rejected entirely in only one of our American states, but some exceptions to the rule, with reference to particular classes of instruments, are to be found in quite a number of other states. Under the statute of Louisiana, providing that all sales, contracts and judgments which shall not be recorded shall be utterly null and void except between the parties thereto, it is held in that state that actual notice or knowledge of an unrecorded instrument is of no effect. "The law-giver," said Chief Justice Ludeling, "was determined, it would seem, to settle the vexed question whether knowledge was equivalent to registry, and he decided it was not."¹

306; *Blanchard v. Tyler*, 12 Mich. 339; s. c. 86 Am. Dec. 57; *Waldo v. Richmond*, 40 Mich. 380; *Lindsey v. Veasey*, 62 Ala. 421; *Chapman v. Holding*, 60 Ala. 522; *McMechan v. Griffing*, 3 Pick. 149; s. c. 15 Am. Dec. 198; *Connihan v. Thompson*, 111 Mass. 270; *Lee v. Cato*, 27 Ga. 637; s. c. 73 Am. Dec. 746; *Bonner v. Stephens*, 60 Tex. 616; *Maybee v. Moore*, 90 Mo. 340; s. c. 2 S. W. Repr. 471; *Durant v. Crowell*, 97 N. C. 367; s. c. 2 S. E. Repr. 541; *Roberts v. Moseley*, 64 Mo. 507; *Masterson v. West End Ry. Co.*, 5 Mo. App. 64; *Bergeron v. Richardott*, 55 Wis. 129; s. c. 12 N. W. Repr. 384; *Campbell v. Roach*, 45 Ala. 667; *Bush v. Golden*, 17 Conn. 594; *Tillinghast v. Champlin*, 4 R. I. 173; s. c. 67 Am. Dec. 510; *Tait v. Crawford*, 1 McCord, 475; *Martin v. Sale*, 1 Bail. Eq. 1; *Brush v. Ware*, 15 Pet. (40 U. S.), 93; *Simpson v. Montgomery*, 25 Ark. 365; s. c. 99 Am. Dec. 228; *Fargason v. Edrington*, 49 Ark. 207; s. c. 4 S. W. Repr. 763; *Redden v. Miller*, 95 Ill. 336; *Frye v. Partridge*, 82 Ill. 267; *Smith v. Yule*, 31 Cal. 180; s. c. 89 Am. Dec. 167; *Hilton v. Young*, 73 Cal. 684; s. c. 14 Pac. Repr. 684; *Jones v. Marks*, 47 Cal. 242; *Traylor v. Townsend*, 61 Tex. 144; *Ely v. Wilcox*, 20 Wis. 523; s. c. 91 Am. Dec. 436; *Johnston v. Gwathmey*, 4 Litt. 317; s. c. 14 Am. Dec. 135; *Honore v. Bakewell*, 6 B. Mon. 67; s. c. 43 Am. Dec. 147; *Morris v. Daniels*, 35 O. St. 406; *Ranney v. Hardy*, 43 O. St. 157; s. c. 1 West. Repr. 52; *Hull v. Noble*, 40 Me. 459, 480; *Rich v. Roberts*, 48 Me. 548; *Baynard v. Norris*, 5 Gill, 483; s. c. 46 Am. Dec. 647; *Smith v. Dunton*, 42 Iowa 48; *Allen v. McCalla*, 25 *Id.* 464; s. c. 96 Am. Dec. 56; *Gilson v. Boston*, 11 Nev. 413; *Cain v. Cox*, 23 W. Va. 594; *Roberts v. Grace*, 16 Minn. 126; *Cordova v. Hood*, 19 Wall. (86 U. S.), 1; *Marier v. Lee*, 2 Utah, 460; *Otis v. Payne*, 86 Tenn. 663; s. c. 8 S. W. Repr. 848; *Myers v. Ross*, 3 Head, 60; *Danbury v. Robinson*, 1 McCart. 213; s. c. 82 Am. Dec. 244; *Whitehorn v. Cranz*, 20 Neb. 392; s. c. 30 N. W. Repr. 406.

¹ *Harang v. Plattsmier*, 21 La. Ann. 426; Rev. Civ. Code (1870), §2266; *Villavaso v. Walker*, 28 La. Ann. 775; *Payne v. Pavey*, 29 *Id.*

In Arkansas, Ohio and North Carolina, the statutes relating to the registry of mortgages are so framed as to make recording essential to their validity as against third persons; hence in these states actual notice of such instruments is ineffectual, and mortgages are given priority according to the order of their registry. The Ohio statute, without any reference to third persons having actual notice, provides that mortgages shall "take effect" from the time of delivery to the recorder; and under this statute it is held that until entered for record they have no effect either at law or in equity against third persons; and that until they take effect as legal instruments they are entirely inoperative to prevent others from acquiring uncontrollable legal interests in the property. The record, it is said, gives them vitality, and the record alone can be appealed to, to determine when they have taken effect.¹

The Arkansas statute provides simply that a mortgage shall be a lien from the time it is filed for record, and not before; and actual notice is held unavailing to give it effect as against third persons.²

116, 117; *Rochereau v. Delacroix*, 26 La. Ann. 584; *Tulane v. Levinson*, 2 *Id.* 787; *Derbes v. Romero*, 32 *Id.* 927.

Prior to Jan. 1, 1870, the rule seems to have been different as to mortgages. *Patterson v. De La Ronde*, 8 Wall. (75 U. S.), 292; but art. 3342 of the Rev. Civ. Code of 1870 omits from the designation of third persons who are not to be affected by an unrecorded mortgage, the clause, "and who have dealt with the debtor in ignorance, or before the existence of this right;" since which, actual notice of a mortgage is unavailing. *Adams v. Daunis*, 29 La. Ann. 315.

¹ Rev. Stats. (1880), §4133; *Home Build. Ass'n v. Clark*, 43 O. St. 427; *Bloom v. Noggle*, 4 O. St. 45, 54; *Sidle v. Maxwell*, *Id.* 236; *White v. Denman*, 1 *Id.* 110; *Bercaw v. Cockerill*, 20 *Id.* 163; *Mayham v. Coombs*, 14 Ohio, 428; *Holliday v. Franklin*, 16 *Id.* 533; *Magee v. Beatty*, 8 *Id.* 396; *Sturgess v. Bank*, 3 McLean, 140. If the record shows only one witness, it is ineffectual; it must show a legal mortgage or it is no record at all. *Bank v. Carpenter*, 7 Ohio, 68. An unrecorded mortgage is of no effect, even against an assignee for the benefit of creditors having actual notice of it. *Erwin v. Shuey*, 8 O. St. 509; but it is good as between the parties. *Home Build. Association v. Clark*, 43 O. St. 427, 434, citing *Riley v. Rice*, 40 *Id.* 441; *Steward v. Hopkins*, 30 *Id.* 502, and qualifying *Holliday v. Franklin*, 16 Ohio, 533.

² Rev. Stats. Ark. (1874), §4288; *Dodd v. Parker*, 40 Ark. 526; *Fry v. Martin*, 33 Ark. 203; *Jacoway v. Gault*, 20 Ark. 190; s. c. 73 Am Dec. 494.

In North Carolina the statutory provision is that no deed of trust or mortgage shall be valid at law to pass any property as against creditors or purchasers for valuable consideration but from the registration thereof; and actual notice is held of no avail.¹ The article of the statute relating to deeds is different, and unusually brief, but it seems to be now determined that under it a subsequent purchaser with notice of a prior unrecorded deed, takes subject to the equitable title which it is held to convey.²

§218. Exceptions Continued—Creditors, etc.

In Virginia, Tennessee and perhaps a few other states, actual notice, while effectual as against a subsequent purchaser, is held to be of no avail as against creditors;³ and

¹ *Hinton v. Leigh* (N. C., 1889), 8 S. E. Repr. 890; *Code* (1883), §1254; *Bank v. Manufacturing Co.*, 96 N. C. 298; s. c. 3 S. E. Repr. 363; *Fleming v. Burgin*, 2 Ired. Eq. 584; *Todd v. Outlaw*, 79 N. C. 235; *Robinson v. Willoughby*, 70 N. C. 358; *Deal v. Palmer*, 72 N. C. 583. But actual notice of a defectively registered mortgage held to charge a subsequent mortgagee not to make further advances. *Todd v. Outlaw*, *supra*. Where a first mortgagee advanced money to save a crop in excess of the amount secured by his mortgage, he is not entitled to such amount to the exclusion of a second registered mortgage, the record of which charges him with notice. *Weathersbee v. Farrar*, 90 N. C. 106.

² *Phifer v. Barnhart*, 88 N. C. 333; *Durant v. Crowell*, 97 N. C. 367; *Hodges v. Spicer*, 79 N. C. 223. Actual notice of an unrecorded title bond, held sufficient. *Derr v. Dellinger*, 75 N. C. 300. Possession held to charge notice of title. *Edwards v. Thompson*, 71 N. C. 177; *Staton v. Davenport*, 95 N. C. 4; and title may pass by estoppel. *Sherill v. Sherill*, 73 N. C. 8.

As the registry of the deed is held necessary to passing the legal title, its surrender or cancellation revests title in the grantor, except as against rights of third parties that may have intervened. *Fortune v. Watkins*, 94 N. C. 304, citing *Davis v. Inscoe*, 84 N. C. 396; *Austin v. King*, 91 N. C. 280.

For the sake of comparison, it may be noticed in this connection that the Maryland statute (Rev. Code, 1878, tit. 24, §18), provides that "no deed of real property shall be valid for the purpose of passing title, unless acknowledged and recorded," and that actual notice is held effectual in that state. *Insolvent Est. of Leiman*, 32 Md. 225; *Johns v. Scott*, 5 Md. 81; *Price v. McDonald*, 1 Md. 403; s. c. 54 Am. Dec. 657; *Frostburg v. Hamill*, 55 Md. 313.

³ *Dobyns v. Waring*, 82 Va. 159; *Cowardin v. Anderson*, 78 Va. 88; *Gray v. Moseley*, 2 Mumf. 546; *Bank v. Neal*, 23 W. Va. 744; *Butler v. Maury*, 10 Humph. 420; *Lookout Bank v. Noe*, 86 Tenn. 21; s. c. 5 S.

this is also the case as to chattel mortgages in Texas and Kansas.¹ In several states, as Indiana, Missouri and Massachusetts, actual notice of an unfiled chattel mortgage is ineffectual as against any class of third persons,² including even an assignee in insolvency.³ In New York a deed though delivered, if not acknowledged nor attested by two subscribing witnesses, is void as against a subsequent grantee with actual notice of it, even though such grantee is not a purchaser for valuable consideration.⁴

§219. The Several Kinds of Actual Notice.

Actual notice as treated in this chapter includes every kind of notice arising from matter of fact, as contradistinguished from the constructive notice which the record charges as a conclusive presumption of law. It exists in a multitude of degrees and arises from a great variety of circumstances and relations, and in its various forms and aspects, it is designated by a variety of terms.⁵ These distinctions are to be considered for the purpose of avoiding confusion, and of reconciling much apparent conflict of de-

W. Repr. 433; *Wilson v. Eifler*, 11 Heisk. 188; *Coward v. Culver*, 12 Heisk. 541; *Edwards v. Brinker*, 9 Dana, 69.

¹ *Brothers v. Mundell*, 60 Tex. 240; *Overstreet v. Manning*, 67 Tex. 657; s. c. 4 S. W. Repr. 248; *Cameron v. Hull*, 26 Kan. 622.

² *Moore v. Young*, 4 Biss. 128, 135; *Bingham v. Jordan*, 1 Allen, 373; s. c. 79 Am. Dec. 748; *Lockwood v. Slevin*, 26 Ind. 125; *Howard v. Chase*, 104 Mass. 251; *Denny v. Lincoln*, 13 Met. 200; *Hughes v. Meniffee*, 29 Mo. App. 192; *Rawlings v. Bean*, 80 Mo. 614; *Wilson v. Milligan*, 75 Mo. 41; *Gassner v. Patterson*, 23 Cal. 299; *Donaldson v. Johnson*, 2 Chand. (Wis.), 160; *Sheldon v. Conner*, 48 Me. 584; *post*, §§269, 270.

³ *Jones on Chat. Mort.*, §314, citing *Hodgson v. Butts*, 3 Cranch, 140; *Denny v. Lincoln*, 13 Met. 200; *Matlock v. Straughn*, 21 Ind. 128.

⁴ *Nellis v. Munson*, 108 N. Y. 453, 457; s. c. 15 N. E. Repr. 739; *Chamberlain v. Spargur*, 86 N. Y. 603.

⁵ By at least one text writer of ability, actual notice is divided into only two classes: express notice and implied notice. *Wade on Notice*, §§5-8. This is about as satisfactory a classification as can be made; but in the decisions we find other distinctions drawn, and other terms used. As to the degrees of actual notice, they are infinite in number, ranging from a brief verbal statement from a doubtful source, to a full and formal written statement from reliable authority. *Smith v. Smith*, 2 Crompt. & M. 231; *North Brit. Ins. Co. v. Hallet*, 7 Jur. N. S. 1263; 1 *Jones on Mort.*, §580.

cision on this subject; but otherwise they are of but little practical consequence, as in legal effect there is no difference between knowledge and actual notice in any form, if notice be imputed at all.¹ Where notice of a fact is by full information directly and personally received, it amounts to knowledge of it, which in all cases includes the legal effect of notice, whether or not it embraces a technical notice; but under the general rule notice does not necessarily imply knowledge, or such a character and extent of information as amounts to actual knowledge.² It is usually held sufficient to constitute notice that the information be of such character as should put a reasonable man having a due regard for the rights of others upon inquiry that, if fairly prosecuted, would lead to a knowledge of the prior right.³ And though no information whatever be shown as given, yet if the circumstances and relations of the matter be such as that one has a conscious knowledge of having the means of information or actual knowledge accessible, it is sufficient to charge him with notice; and that he purposely refrains from inquiry will not release him from its consequences.⁴

¹ *Morrison v. Kelley*, 22 Ill. 610; s. c. 74 Am. Dec. 169; *Schutt v. Large*, 6 Barb. 373; *Hill v. Epley*, 31 Pa. St. 335; *Ellison v. Wilson*, 36 Vt. 67; *Prosser v. Rice*, 28 Beav. 68, 74.

² *Wade on Notice*, §§3, 4; 2 Pom. Eq. Jur., §592.

³ *Traylor v. Townsend*, 61 Tex. 144; *Littleton v. Giddings*, 47 Tex. 109; *Hunt v. Dunn*, 74 Ga. 120; *Clafin v. Duncan*, *Id.* 348; *Hoy v. Bramhall*, 19 N. J. Eq. 593; s. c. 97 Am. Dec. 687; *Eiseman v. Gallagher*, 24 Neb. 79; *Wilson v. McCullough*, 23 Pa. St. 440; s. c. 62 Am. Dec. 347; *Converse v. Blumrich*, 14 Mich. 109; s. c. 90 Am. Dec. 290; *Cambridge Bk. v. Delano*, 48 N. Y. 326; *Vattier v. Hinde*, 7 Pet. (32 U. S.), 252; *Hill v. Moore*, 62 Tex. 610, 615; *Effinger v. Hall*, 81 Va. 94.

⁴ *Musgrove v. Bosner*, 5 Or. 313; s. c. 20 Am. Rep. 737; *Williamson v. Brown*, 15 N. Y. 354; *Allen v. McCalla*, 25 Iowa, 464; s. c. 96 Am. Dec. 56; *Hankinson v. Barber*, 29 Ill. 80; *Whitbread v. Jordan*, 1 You. & Coll. Exch. 303; *Bunting v. Ricks*, 2 Dev. & Bat. Eq. 130; *Bonner v. Stephens*, 60 Tex. 618; *Brinkman v. Jones*, 44 Wis. 498; *Montgomery v. Kopperl*, 75 Cal. 128; s. c. 19 Pac. Repr. 178; *Burnham v. Brennan*, 42 N. Y. Sup. Ct. 51.

Inquiry is necessary only where it is a duty. *Kyle v. Ward*, 81 Ala. 120; s. c. 1 South. Repr. 468; and knowledge sufficient to put on inquiry does not necessarily charge notice; *Tompkins v. Henderson*, 83 Ala. 391; s. c. 3 South. Repr. 774; nor does knowledge of an adverse

§220. Kinds and Degrees of Actual Notice—Continued.

Notice has in law a technical and somewhat artificial signification. No one has so far been able to give to it, within any reasonably brief compass, an accurate and satisfactory definition,¹ and no general definition will be here attempted; but it is believed that the meaning of actual notice may be fairly arrived at from a consideration of its various features as presented in these sections. While notice, aside from that of the record, may in a given case include less than knowledge, it may on the other hand require something more than the word in its ordinary sense necessarily imports.² Thus, using the word in a common acceptation, A. may give notice to B. of an adverse prior claim, and yet, because of the statement being indefinite and unreliable, it may be held that B. has not received notice—that is, notice in its legal sense, or such a character of information as will be held by the courts to charge him with the consequences of notice. Actual notice may, in some cases, be imputed in the first instance as a *prima facie* presumption from information given sufficient to put on inquiry, and this presumption may be rebutted by proof showing that

claim alone conclusively indicate bad faith. *McCagg v. Heacock*, 34 Ill. 476; s. C. 85 Am. Dec. 327; *Hutchins v. Bacon*, 46 Tex. 409.

¹ Some definitions are here given for the sake of illustration: Notice is knowledge of all that is communicated to the purchaser, or that a proper use of that information would enable him to ascertain. *Ch. J. Willie*, in *Traylor v. Townsend*, 61 Tex. 147, citing *Le Neve v. Le Neve*, 2 Smith Lead. Cas. 154; *Hines v. Perry*, 25 Tex. 444.

Notice in its technical sense is the definite legal cognizance of a fact, and may be either actual or presumptive. It differs from knowledge, which may exist without notice, and there may be notice without any actual knowledge. *Bipsham's Principles of Eq.* 325.

Notice is information given of some act done, or the interpellation by which some act is required to be done. *Bouvier's Law Dict.* Constructive notice is of two kinds: that which arises from testimony, and that which results from a record. *Griffith v. Griffith*, 1 Hoff. Ch. 153. Constructive notice is a legal inference from established facts. *Birdsall v. Russell*, 29 N. Y. 220, 249.

² This will appear by reference to the latter part of the definition of notice given by Mr. Webster: "Intelligence by whatever means communicated; knowledge given or received; means or evidences of knowledge; intimation; premonition."

the inquiry thus suggested was fairly prosecuted without leading to a knowledge of the fact indicated;¹ but the constructive notice imparted by the record is conclusive, and not rebuttable under any circumstances.²

§221. Continued—Constructive and Implied Notice.

The term constructive notice, or some similar term, ought to be applied exclusively to the notice that is imparted by the record, which is absolute and need not in any sense or degree be actually communicated.³ As used, however, it applies both to notice by the record and to actual notice. Thus, where notice is imputed from facts and circumstances not amounting to knowledge, nor justifying the inference of actual personal knowledge, but is presumed from information such as imposes the duty of inquiry, it is often

¹ *Williamson v. Brown*, 15 N. Y. 554; *Story's Eq. Jur.*, §410a; *Jones v. Smith*, 1 Hare, 43; *Flagg v. Mann*, 2 Sumn. 486, 554; *Massie v. Greenhow*, 2 Patt. & Heath, 255; *Epley v. Withrow*, 7 Watts, 163, 167; *Wilson v. Williams*, 25 Tex. 54; *Thompson v. Pioche*, 44 Cal. 508, 516; *Rogers v. Jones*, 8 N. H. 264; *Duff v. Duff*, 71 Cal. 513; s. c. 12 Pac. Repr. 570.

² *Edwards v. Barwise*, 69 Tex. 84; s. c. 6 S. W. Repr. 677; *Jordan v. Farnsworth*, 15 Gray, 517; *Clabaugh v. Byerly*, 7 Gill, 354; *Hine v. Dodd*, 2 Atk. 275; *Dunham v. Dey*, 15 Johns. 555; s. c. 8 Am. Dec. 282.

³ "This form of expression—'constructive notice'—is applied indiscriminately to such notice as is not susceptible of being explained or rebutted, and to that which may be. It seems more appropriate to the former kind of notices. It will then include notice by registry, and by *lis pendens*. But such notice as depends on possession, upon knowledge of an agent, upon facts to put one on inquiry, and some other similar matters, although often called constructive notice, is rather implied or presumptive notice, subject to be rebutted or explained." *Story's Eq. Jur.*, §410a; and see, to somewhat the same effect, the remarks of Lord Chan. Chelmsford, in *Espin v. Pemberton*, 3 De G. & J. 547, 554, quoted in note to 2 Pom. Eq. Jur., §604.

As above defined, constructive notice might properly include notice from recitals in title papers through which the title must be traced. This is a species of conclusive notice by written instrument; the relation of the papers to the party's title supplying the place of registry as to him. *Renick v. Frazier*, 55 Tex. 102; *Dean v. Long*, 122 Ill. 447; s. c. 14 N. E. Repr. 34; *Hamilton v. Nutt*, 34 Conn. 501; *Poage v. Wabash Ry.* 24 Mo. App. 199; *Smith v. Lowry*, 113 Ind. 37; s. c. 15 N. E. Repr. 17; *ante*, §178; *Rosser v. Cheney*, 61 Ga. 468.

termed constructive notice, and is in this sense but a degree of actual notice in its broader meaning.¹ The fact of actual possession may be entirely unknown to an adverse party, and yet by it, under the general rule, he is constructively charged with actual notice of the possessory title, as distinguished from notice by a record of that title.² The notice in these last instances is sometimes, and without doing violence to the meaning of words, called implied notice;³ but as used in the law-books this term is ordinarily applied to that notice which is imputed by law to the principal, because his agent has knowledge, or is affected by matter of fact in any other form or degree sufficient to charge notice.⁴ As affecting the agent, it is actual notice in the

¹ "I hold him chargeable with constructive notice, because he had information sufficient to put him on inquiry." Ch. Kent, in *Stery v. Arden*, 1 Johns. Ch. 261.

"Constructive notice is in its nature no more than evidence of notice, the presumptions of which are so violent that the court will not allow of its being controverted." Baron Eyre, in *Plumb v. Fluitt*, 2 Anstr. 432; and to same effect, *Hewitt v. Loosemore*, 9 Hare, 449, 455; *Kennedy v. Green*, 3 My. & K. 699, 719; 1 Sto. Eq. Jur., §399; 2 Eq. Lead. Cas. (4 Am. ed.), 121; *Espin v. Pemberton*, 3 De G. & J. 547, 554.

Constructive notice is imputed where a party is put upon inquiry, or where he designedly abstains from inquiry. *Jones v. Smith*, 1 Hare, 43, 55; 2 Eq. Lead. Cas. 123; *Hervey v. Smith*, 22 Beav. 299; *Hill v. Moore*, 62 Tex. 610, 614; *Vredenburg v. Burnet*, 31 N. J. Eq. 229. Constructive notice is of two kinds: that which arises from testimony, and that which results from a record. *Griffith v. Griffith*, 1 Hoff. Ch. 153.

² *Glendenning v. Bell*, 70 Tex. 632; *Peasley v. McFadden*, 68 Cal. 611; *Watkins v. Edwards*, 23 Tex. 443; *Edwards v. Thompson*, 71 N. C. 177; *Hughes v. U. S.*, 4 Wall. 232; *Wickes v. Lake*, 25 Wis. 71; *Sutton v. Jervis*, 31 Ind. 265; s. c. 99 Am. Dec. 631; *Hunter v. Watson*, 12 Cal. 363; s. c. 78 Am. Dec. 543; *Morrison v. Kelley*, 22 Ill. 610; s. c. 74 Am. Dec. 169; *Harris v. McIntyre*, 118 Ill. 275; s. c. 8 N. E. Repr. 182; *post*, §228.

The rule prevails even in some states whose statutes require "actual" notice. *Vaughan v. Tracy*, 22 Mo. 415; s. c. 69 Am. Dec. 471; *Parker v. Kane*, 4 Wis. 1; s. c. 65 Am. Dec. 283; *Cunningham v. Brown*, 44 Wis. 72; but is denied in Maine, Massachusetts and Connecticut. *Beal v. Gordon*, 55 Me. 482; *Lamb v. Pierce*, 113 Mass. 72; *Harral v. Laverty*, 50 Conn. 46.

³ Implied notice arises from an inference of *fact*; constructive notice being the creature of positive law, rests upon strictly *legal* inference. *Wade on Notice*, §8; but as the term constructive notice is commonly used, it is applied where the inference arises from matter of fact as well as matter of record. *Birdsall v. Russell*, 29 N. Y. 220, 249.

⁴ *Broughton v. Foster*, 69 Ga. 714; *Cunningham v. Woodbridge*, 76 Ga. 302; *Walker v. Schreiber*, 47 Iowa, 529; *Smith v. Ayer*, 101 U. S.

general sense heretofore considered; and it is held to charge the principal by superadding to it the operation of a rule of law based on the relation of principal and agent.

Actual notice is more frequently spoken of not in its general sense as contra-distinguished from notice by the record, but in a more limited sense, and as distinguished merely from the implied and constructive notice last referred to above. In this sense it means that the facts upon which notice is predicated in some manner directly tend to show that information of the adverse right was personally brought home to the consciousness of the party charged.¹ As thus used, it requires the evidence of notice to be more cogent and direct than where the notice is constructively imputed from facts merely imposing the duty of inquiry, or affording the means of knowledge.² This distinction relates principally to the degree and character of proof requisite, and will be further considered in the next section treating of statutes requiring "actual" notice.

§222. Statutory Distinctions as to Actual Notice.

In Ohio the statute provides that an unrecorded conveyance shall be deemed fraudulent and void as against a subsequent *bona fide* purchaser having no knowledge of it;³ and in about ten states, including Maine, Massachu-

320; Hovey v. Blanchard, 13 N. H. 145; May v. LeClaire, 11 Wall. 217; Meier v. Blume, 80 Mo. 179; Williamson v. Brown, 15 N. Y. 354, 359; Stanley v. Chamberlain, 39 N. J. L. 565; Fuller v. Bennett, 2 Hare, 394.

¹ Musgrove v. Bosner, 5 Or. 313; s. c. 20 Am. Rep. 737; Story's Eq. Jur., §399; Tillinghast v. Champlin, 4 R. I. 173, 215; s. c. 67 Am. Dec. 510; Williamson v. Brown, 15 N. Y. 354; Hastings v. Cutler, 24 N. H. 481; Buck v. Paine, 50 Miss. 648, 655; Lamb v. Pierce, 113 Mass. 72; Parker v. Osgood, 3 Allen (85 Mass.), 487; Hull v. Noble, 40 Me. 459, 480; Maul v. Rider, 59 Pa. St. 167, 171. This actual notice is by Mr. Wade called express notice. Wade on Not. §§5-7.

² Crassen v. Swoveland, 22 Ind. 427; Barnes v. McClinton, 3 Penn. 67; Curtis v. Mandy, 3 Met. 405, and cases above.

³ Rev. Stats. (1880), §4134. The tenor of the Ohio decisions on notice does not seem to be materially different from that of other states whose statutes merely require notice, or good faith, instead of knowledge. Possession is held to charge notice, even though it be not known

setts, Missouri, Kansas and Tennessee, such conveyance is to be deemed void as against third parties not having "actual" notice of it.¹ The actual notice thus specified in the statute may fairly be presumed to mean notice by matter of fact as distinguished from the record notice for which provision is there made; and this seems to be the view of it taken by the courts of these states.² With but one or two exceptions³ they hold that this actual notice does not mean actual knowledge;⁴ that evidence of facts and circumstances sufficient to put upon inquiry will charge notice,⁵ and that possession, if known, charges notice.⁶ As

to the subsequent purchaser. *Ranney v. Hardy*, 43 O. St. 157; s. c. 1 West. Repr. 52; *Bank v. Sawyer*, 38 O. St. 339, 343; *Kelley v. Stanberry*, 13 Ohio, 408, 426; *House v. Beatty*, 7 *Id.* 84, 90; and so, constructive notice has been imputed upon proof of matter sufficient to put a man of common prudence upon inquiry. *Reeder v. Barr*, 4 *Id.* 446, 458; *Cunningham v. Buckingham*, 1 *Id.* 264, 267. As to mortgages of real estate, actual notice is, under a different statute, excluded entirely; *ante*, §217.

¹ See statutes of these states in the last chapter of this work; and also those of Indiana, Wisconsin, Arkansas, Utah and New Mexico. In some states, as Connecticut and North Carolina, the statutes are so framed that nothing whatever is said as to notice, knowledge or good faith; the declaration in effect being merely that record is necessary to pass title as against third parties. In a few states, as New Hampshire, the statute does not seem in any way to prescribe the effect of record or want of record.

² *Roberts v. Mosley*, 64 Mo. 407; *Maupin v. Emmons*, 47 Mo. 304; *Price v. McDonald*, 1 Md. 403; s. c. 54 Am. Dec. 567; *Nute v. Nute*, 41 N. H. 60; *Brinkman v. Jones*, 44 Wis. 498; *Hoppin v. Doty*, 25 Wis. 573; *Ringgold v. Waggoner*, 14 Ark. 69; *Blatchley v. Osborn*, 33 Conn. 226; *Spofford v. Weston*, 29 Me. 140; *Bunting v. Ricks*, 2 Dev. & Bat. Eq. 130; *Clouse v. Elliott*, 72 Ind. 302; *Murrell v. Watson*, 1 Tenn. Ch. 342.

³ In Massachusetts the courts proceed on the theory that actual notice and actual knowledge mean the same thing. *Parker v. Osgood*, 3 Allen, 487; *Sibley v. Leflingwell*, 8 Allen, 584; *White v. Foster*, 102 Mass. 375; and they hold that possession is not notice. *Lamb v. Pierce*, 113 Mass. 72; *Pomeroy v. Stevens*, 11 Met. 244; *Mara v. Pierce*, 9 Gray, 306. That actual notice is synonymous with actual knowledge, see also *Crassen v. Swoveland*, 22 Ind. 428, holding that possession under an unrecorded defeasance is not notice.

⁴ *Knapp v. Bailey*, 79 Me. 195; s. c. 9 Atl. Repr. 122; *Brinkman v. Jones*, 44 Wis. 498.

⁵ *Speck v. Riffin*, 40 Mo. 405; *Avery v. Johann*, 27 Wis. 246; and cases cited above. See also, note 3 to §244, p. 392. *post*.

⁶ *Vaughan v. Tracy*, 22 Mo. 415; s. c. 69 Am. Dec. 471; *Cunningham v. Brown*, 44 Wis. 72; *Brinkman v. Jones*, *Id.* 498; *Edwards v. Thomp-*

the word "actual" does not occur in a majority of the registry statutes, the courts of these states where it is so found have sometimes felt called upon to give an effect to its use; and this they have usually done in requiring something more of fullness and directness in the evidence of facts charging notice than would perhaps otherwise have been requisite. The adoption of the word into the statute did not induce the Wisconsin court to abrogate the rule that possession charged notice, but did lead them to so far modify it as to hold that the continuing possession of a vendor, after his conveyance to another has been recorded, would not charge notice of a continuing claim of right or title in the vendor, unless such possession was actually known to the party sought to be charged with notice.¹ It will be observed from the statute and decisions cited in this section that the courts hold, as a rule, that constructive notice satisfies the statutory requirement of actual notice; the constructive notice that is based on matter of fact being but a species or degree of actual notice.²

son, 71 N. C. 177; Sutton v. Jervis, 31 Ind. 265; s. c. 99 Am. Dec. 631; Kelley v. Stanberry, 13 Ohio, 408, 426; Macon v. Sheppard, 10 Humph. 335; Shumate v. Reavis, 49 Mo. 333; Forrest v. Jackson, 56 N. H. 357; Johnson v. Clark, 18 Kan. 157, 164; Ringold v. Bryan, 3 Md. Ch. 488; McKinzie v. Perrill, 15 O. St. 162; Tankard v. Tankard, 79 N. C. 54; Barnes v. Union, 91 Ind. 301; Webster v. Maddox, 6 Me. 256; Greer v. Higgins, 20 Kan. 420.

In Connecticut and Maine possession, *per se*, is not notice. Harrall v. Laverty, 50 Conn. 46; Beal v. Gordon, 55 Me. 482; but where knowledge of it is brought to the subsequent purchaser, it is sufficient to put him on inquiry. Butler v. Stevens, 26 Me. 484; McLaughlin v. Shepherd, 32 Me. 143.

¹ "We recognize the obligation to give some effect to the term 'actual notice,' as distinguished from mere 'notice,' and must, therefore, hold that no constructive knowledge shall be imputed to the purchaser as a ground of notice. The rule that actual, visible occupation, whether known to the purchaser or not, is notice to him of the rights of the occupant, will not be applied to"—the case at bar; nor presumably to any case where the possession was not known to the purchaser. Brinkman v. Jones, 44 Wis. 498, 520.

² The confusion growing out of an inaccurate use of the terms, "actual," "constructive" and "implied," in connection with notice, is to be regretted; but it is hardly possible that the classification of any text writer will obviate the difficulty. For a very full discussion of the subject, see 2 Pom. Eq. Jur., §§591-613.

§223. Putting on Inquiry.

The general rule, as already stated, is that whatever is sufficient to put a reasonable man on inquiry will charge notice, and his failure to make the inquiry, whether from design or mere negligence, will not absolve him from the consequences of notice.¹ It is difficult to formulate any but very general rules as to what facts and circumstances will be sufficient. Each case must of necessity depend very largely on its own circumstances.² Frequently quite a variety of considerations enter into the determination of whether certain facts should be held to charge the conscience and intelligence of the subsequent purchaser. Where it is proposed to constructively charge a person with notice, the evidence should show that sufficient facts were brought home to his knowledge to charge his conscience, and this should appear not merely as a possible inference, but as a matter established under the usual rules of proof.³ The inquiry suggested should be such as if prosecuted with ordinary diligence and understanding would lead to a knowledge of the requisite fact.⁴ The notice will be sufficient if it is such as men act on in the ordinary affairs of life.⁵ It

¹ *Harrison v. Boring*, 44 Tex. 256; *Oliver v. Piatt*, 3 How. (44 U. S.), 333; *Clafin v. Duncan*, 74 Ga. 348; *Dugger v. Dugger* (Va.), 4 S. E. Repr. 171; *Warren v. Sweet*, 31 N. Y. 332; *Gress v. Evans*, 1 Dak. Ter. 387; *Lyons v. Leahy*, 15 Or. 8; s. c. 13 Pac. Repr. 643; *Reilly v. Hannibal*, etc., 94 Mo. 600; s. c. 7 S. W. Repr. 407; 13 West. Repr. 662; *Acer v. Westcott*, 46 N. Y. 384; s. c. 7 Am. Rep. 355; *Jenkins v. Eldredge*, 3 Story, 181; *Hill v. Moore*, 62 Tex. 610; *Morrison v. March*, 4 Minn. 422; *Foster v. Stallworth*, 62 Ala. 547; *Buck v. Holloway*, 2 J. J. Marsh. 163; *Hastings v. Cutler*, 24 N. H. 481; *Sergeant v. Ingersoll*, 15 Pa. St. 343; *Hinde v. Vattier*, 7 Pet. (32 U. S.), 252, and cases cited *ante*, §219.

² *Harrison v. Boring*, *supra*; *Wethered v. Boon*, 17 Tex. 150; *Knapp v. Bailey*, 79 Mo. 195; s. c. 9 Atl. Repr. 122; *Hines v. Perry*, 25 Tex. 443.

³ *Simms v. Morse*, 4 Hughes, 579; 2 Pom. Eq. Jur., §664; *Vest v. Michie*, 31 Gratt. 149; s. c. 31 Am. Rep. 722. A fact, however, it seems, may acquire such notoriety as, of itself, to charge notice. See *Martel v. Somers*, 26 Tex. 551.

⁴ *Stokes v. Reilly*, 121 Ill. 166; s. c. 11 N. E. Repr. 877; 9 West. Repr. 524; *Wethered v. Boon*, 17 Tex. 150; *Martel v. Somers*, 26 Tex. 551; *Mayfield v. Averitt*, 11 Tex. 140.

⁵ *Curtis v. Mundy*, 3 Met. (44 Mass.), 405; *Gallard v. Jackman*, 26 Cal. 79; s. c. 85 Am. Dec. 172.

need not specify the adverse right with entire accuracy, or in detail. Thus, a party notified of a prior unrecorded mortgage upon some portion of the premises, is sufficiently charged with notice, although it prove to be an incumbrance on the whole property.¹ Where the information consists of a statement coupled with a counter-statement, as that a prior written contract affecting the property had once been made, but had been abandoned and destroyed without ever having been carried into effect, the purchaser is not necessarily put on inquiry, since he may rely on the statement in its entirety;² except in cases where the latter explanation is made by the grantor, or other interested person, under circumstances that do not justify a reliance on its truth without further investigation.³

¹ 1 Jones on Mort., §593; *Martin v. Cauble*, 72 Ind. 67; 2 Eq. Lead. Cas. (4 Am. ed.), pt. 1, 190; *Mier v. Blume*, 80 Mo. 179; *Willink v. Morris*, 4 N. J. Eq. 377; *Jones v. Williams*, 24 Beav. 47; *Webb v. Robins*, 77 Ala. 176. It is not necessary to actual notice of title by deed that there be an exhibition of the deed. *White v. Foster*, 102 Mass. 375. For a case of facts held sufficient to charge notice, see *Dugger v. Dugger* (Va.), 4 S. E. Repr. 171.

² *Graham v. Hawkins*, 1 Tex. Un. Cas. 514, 518; *Williamson v. Brown*, 15 N. Y. 354, 360. *In re Bright's Trusts*, 21 Beav. 430; *Curtis v. Blair*, 4 Cush. 309, 328; *Boyce v. Grundy*, 3 Pet. 310; *Rogers v. Wiley*, 14 Ill. 65; s. c. 56 Am. Dec. 491; *Buttrick v. Holden*, 3 Met. 335. Knowledge of an adverse claim does not alone indicate bad faith. *McCagg v. Heacock*, 31 Ill. 476; s. c. 85 Am. Dec. 327; *Kyle v. Ward*, 81 Ala. 120; *Hutchins v. Bacon*, 46 Tex. 409.

An attaching creditor was informed by the debtor that he had previously executed a deed to another, but that the deed had not been acknowledged nor delivered, and to corroborate this last statement, the debtor exhibited the deed which was still in his possession. Held that the creditor might rely on the truth of the statement, without further investigation. *Rogers v. Jones*, 8 N. H. 264; *Jones v. Smith*, 1 Hare, 43.

³ Where the information comes not from a disinterested third person, but from the grantor himself, his mere statement that a mortgage had been paid, or the title perfected, or an equitable claim removed, is not sufficient to stop further inquiry. "If it would be sufficient diligence to rely upon his mere word of denial, it would not likely be wanting in any case." *Littleton v. Giddings*, 47 Tex. 109, 118; *Russell v. Petree*, 10 B. Mon. 184.

Notice of an intention to execute a deed is not sufficient. Until such intent is carried into execution, the title has not passed, and it may be that the intention will fail or be altered. *Cothay v. Sydenham*, 2 Bro. Ch. 291; *Hughes v. Meniffee*, 29 Mo. App. 192. In Massachusetts, where

§224. Sources of Information.

The early rule that the notice must come from a party interested in the property, or his agent,¹ is restricted to cases of notice in its limited and technical or formal sense; and there is no fixed rule that information, in order to put on inquiry, must proceed from a party at interest.² Ordinarily the statements of strangers, speaking generally from hearsay, are not entitled to the attention and credence usually given to information coming from one directly interested; but the question involved relates merely to the weight that may properly be due to the statement. The information must come from a credible source;³ but cer-

the fullest degree of notice is required, a creditor who knew that a deed of the debtor's land was being executed to another creditor, attached before the deed was recorded, but not until after its execution and delivery, and his lien was held to have preference over the deed. *Cushing v. Hurd*, 4 Pick. 252; s. c. 16 Am. Dec. 335; and see *Priest v. Rice*, 1 Pick. 168; s. c. 11 Am. Dec. 156.

Where a deed is taken but not recorded, and the purchaser thereunder gives a mortgage of the property, the mere fact that his deed to the premises is unrecorded does not put upon inquiry as to any rights of his grantor. *Davis v. Lutkieweiz*, 72 Iowa, 254; s. c. 33 N. W. Repr. 670; but where, in such case, it is a mortgage back to the grantor in the unrecorded deed, and the record of the mortgage is known to the subsequent purchaser, it is a significant fact, sufficient to suggest to him that a sale has been made, and to put him on inquiry as to such grantor's title. "The inference, we think," said Adams, C. J., "would necessarily arise in any person's mind possessed of ordinary intelligence, that Brown had sold the land to Holland, the mortgagor, and that there had been an omission either to make a deed, or to record it if made." *Clark v. Holland*, 72 Iowa, 34; s. c. 33 N. W. Repr. 350. But proof merely that the subsequent purchaser was a subscribing witness to a former deed of the premises, is not sufficient to charge constructive notice. "A mere suspicion of notice, even though it be a strong suspicion, will not suffice. The notice must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of *mala fides*." *Anderson, J., in Vest v. Michie*, 31 Gratt. 149; s. c. 31 Am. Rep. 722.

¹ *Barnhart v. Greenshields*, 9 Moore's P. C. C. 36; *The Natal, etc., Co. v. Good*, 2 L. R. P. C. 121; *Satterfield v. Malone*, 35 Fed. Repr. 445; s. c. 1 Law Rep. Annotated, 35; *Rogers v. Hoskins*, 14 Ga. 166; *Parkhurst v. Hosford*, 21 Fed. Repr. 827.

² *Lawton v. Gordon*, 37 Cal. 202; *Martel v. Somers*, 26 Tex. 551, 561.

³ *Mulliken v. Graham*, 72 Pa. St. 484; *Curtis v. Mundy*, 3 Met. (44 Mass.), 405.

tain and direct information given by a third person known to be reliable and who, for example, had seen the prior deed, could not be disregarded by a reasonable man, and is effectual to charge notice. In many cases, as where the rights of minors and married women are involved, it is peculiarly appropriate that the notice should come from a relative or friend.¹

Where there is intimate relationship or business connections between the subsequent purchaser and the common vendor, notice to the former of a prior conveyance by the vendor has in some cases been inferred almost entirely from these circumstances alone.² If not sufficient of themselves, but slight additional circumstances will usually be requisite in such cases to satisfy the mind of the existence of knowledge on the part of the person sought to be charged.³ Where facts that may materially affect the title are suggested

¹ *Butcher v. Yocum*, 61 Pa. St. 168; s. c. 100 Am. Dec. 625; *Ripple v. Ripple*, 1 Rawle, 383.

A statement by the recorder that the seller had already made a deed of the property to another, which had been deposited for record, but withdrawn before it was actually recorded, held sufficient to charge notice. *Lawton v. Gordon*, 37 Cal. 202. A statement from the claimant of the adverse right, though brief and general in its terms, will be sufficient to put upon further investigation. *Bartlett v. Glascock*, 4 Mo. 62; *Oliver v. Sanborn*, 60 Mich. 346; s. c. 27 N. W. Repr. 527; *Blatchley v. Osborne*, 33 Conn. 226. A remark by the grantor, made some time previously, that he was not then able to make a good title, but soon would be, does not put the purchaser on notice of an unrecorded deed. *Chicago v. Witt*, 75 Ill. 211.

² *Spurlock v. Sullivan*, 36 Tex. 511, intimate acquaintanceship; *Trefts v. King*, 18 Pa. St. 157, father and son; *Tillinghast v. Champlin*, 4 R. I. 173; s. c. 67 Am. Dec. 510, acquaintanceship and other circumstances; *Ringgold v. Waggoner*, 14 Ark. 69, father and son.

An attorney is charged with notice of legal defects in proceedings taken under his direction, and as to such cannot be an innocent purchaser. *Gilpin v. Page*, 18 Wall. 350; *Gray v. Parpart*, 106 U. S. 679; but proof merely that he was a subscribing witness to a former deed of the property, does not charge notice. *Vest v. Michie*, 31 Gratt. 149; s. c. 31 Am. Rep. 722; *White v. Fisher*, 77 Ind. 65; s. c. 40 Am. Rep. 287.

³ *Dubois v. Barker*, 4 Hun. 80; *Hoxie v. Carr*, 1 Sum. 173; *Flagg v. Mann*, 2 Sum. 487.

Notice that the property belongs to a partnership has been held sufficient to charge it in the hands of a purchaser with partnership debts.

by any matter of record pertaining to the title, an inquiry as to the facts becomes a duty.¹

§225. Vague Statements and Rumors.

A person is not affected with notice by vague statements, rumors and mere hearsay reports in relation to prior adverse claims to the property, since matters of this kind do not furnish any positive information, nor afford any clue by which an inquiry may be successfully prosecuted.² A search for the truth of every flying report of this character cannot be reasonably expected of any one. Informing a party that he will purchase at his peril, or a vague statement that the vendor's title is subject to an equity, is not sufficient.³ The principles already considered, applicable to the matter of vagueness and uncertainty in recitals contained in written instruments, are measurably applicable to the communica-

Hoxie v. Carr, *supra*; Sigourney v. Munn, 7 Conn. 324; but see Reynolds v. Ruckman, 35 Mich. 80; Tillinghast v. Champlin, *supra*.

¹ Mason v. Brock, 87 Mo. 329; s. c. 3 West. Repr. 208. The reference or allusion to the facts, however, may be so vague and indefinite as not to put on inquiry. See *ante*, §§180-183.

² Wethered v. Boon, 17 Tex. 143; Jacques v. Weeks, 7 Watts, 261; Hawley v. Bullock, 29 Tex. 222; Wailes v. Cooper, 24 Miss. 208; Wildgood v. Wayland, Gouldsb. 147; Jackson v. Van Valkenburg, 8 Cow. 260; Jolland v. Stainbridge, 3 Ves. 478; Fry v. Porter, 1 Mod. 300; Butcher v. Stapely, 1 Vern. 363; Butler v. Stevens, 26 Me. 484; Doyle v. Teas, 4 Scam. 202; Martel v. Somers, 26 Tex. 551; Wilson v. McCulloch, 23 Pa. St. 440; s. c. 62 Am. Dec. 347; Woodworth v. Paige, 5 O. St. 70; Bugbee's Appeal, 110 Pa. St. 331; Shepard v. Shepard, 36 Mich. 173; Lamont v. Stimson, 5 Wis. 443; Chicago v. Witt, 75 Ill. 211; Maul v. Rider, 59 Pa. St. 167, 171; French v. Loyal Co., 5 Leigh, 627, 660; Piatt v. Vattier, 1 McLean, 146; Lambert v. Newman, 56 Ala. 623; Hall v. Livingston, 3 Del. Ch. 348; Hottenstein v. Lerch, 104 Pa. St. 454; Hood v. Fahnstock, 1 Barr, 470; s. c. 44 Am. Dec. 147; Reynolds v. Ruckman, 35 Mich. 80; Ratteree v. Conley, 74 Ga. 153; Parker v. Kane, 4 Wis. 1; s. c. 65 Am. Dec. 283.

³ Wade on Notice, §29; Pitman v. Sofley, 64 Ill. 135; Massie v. Greenhow, 2 Pat. & H. 255; Jolland v. Stainbridge, 3 Ves., Jr., 478; Flagg v. Mann, 2 Sumn. 487.

"To set on foot an inquiry into the foundation of mere rumors would in most cases be a vain and impracticable pursuit. *Lex neminem cogit ad vana seu impossibilia.*" Jacques v. Weeks, 7 Watts, 261, 267

tion of information in other methods, where the sufficiency of the information to put on notice is to be determined.¹

§226. Inquiry to be Prosecuted.

A purchaser who is put on inquiry should have recourse to some disinterested source of information, and hence cannot safely rely on the explanation of the common vendor, who may have a strong motive for misleading him.² Where the notice is of a prior conveyance, it will not be sufficient for him to merely examine the records for the instrument; he should make the inquiry for it of the grantee therein, or of some person likely to possess knowledge of it.³ If the alleged claimant of the adverse right, when called upon for information, declines, or is unable to respond, and the purchaser has no available means of ascertaining the truth of the report, he will be safe in accepting the title. If such silence does not amount to an estoppel, it is at least a reason why the purchaser should not be charged with bad faith for not being better informed.⁴ A denial by one when asked if he has a claim against property, or right thereto, will in

¹ *Ante*, §§180-183. Knowledge of the existence of a debt does not charge notice of a mortgage to secure it. *Bell v. Tyson*, 74 Ala. 353.

² *Littleton v. Giddings*, 47 Tex. 109; *Bunting v. Ricks*, 2 Dev. & B. Ch. 130; *Russell v. Petrie*, 10 B. Mon. 186; *Price v. McDonald*, 1 Md. 403; s. c., 54 Am. Dec. 637; *Hudson v. Warner*, 2 Har. & Gill, 415.

³ *Wilson v. McCullough*, 23 Pa. St. 440; s. c. 62 Am. Dec. 347; *Hains v. Hains* (Mich.), 37 N. W. Repr. 563; *Witter v. Dudley*, 42 Ala. 616; *Russell v. Sweezey*, 22 Mich. 235; *Littleton v. Giddings*, 47 Tex. 109; *Shotwell v. Harrison*, 30 Mich. 179; *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772.

⁴ *Massie v. Greenhow*, 2 Pat. & H. 255; *Epley v. Withrow*, 7 Watts, 163, 167.

One who refuses to impart a fact peculiarly within his knowledge, in response to a question asked in good faith, ought not to be allowed to allege that the party whom he keeps in ignorance was put on inquiry; and this has been held where the question was asked of the attorney of the other party, and who declined to answer. *McGehee v. Gindrat*, 20 Ala. 951.

Where the holder of a recorded mortgage prepared as counsel a subsequent mortgage, maintaining silence as to his own, such silence was held not to amount to an estoppel. *Paine v. French*, 4 Ohio, 318; and see *Rice v. Dewey*, 54 Barb. 455.

connection with circumstances justifying the inference of fraud, authorize a court to postpone his rights to those of the person he may have thus misled.¹

§ 227. Presumption May be Rebutted by Inquiry.

The presumption of knowledge arising from facts putting on inquiry is not conclusive, but is an inference of fact that may be rebutted by showing that due inquiry was made, without leading to a knowledge of the prior right.² The *prima facie* inference of notice rests upon the presumption either that the party has made the inquiry and ascertained the extent of the prior right, or that in failing to make such inquiry he has been guilty of negligence equally fatal to his claim as a *bona fide* purchaser.³ If an inquiry prosecuted with reasonable diligence does not lead to any definite knowledge of the adverse claim, the purchaser may buy with safety.⁴ What will constitute due inquiry and diligence must depend so largely on the facts of each particular case that no universal rule is possible on this point.⁵

¹ Carr v. Wallace, 7 Watts, 394, 400; Chester v. Greer, 5 Humph. 26; Fay v. Valentine, 12 Pick. 40; s. c. 22 Am. Dec. 397; Broome v. Beers, 6 Conn. 198; Platt v. Squire, 12 Met. (53 Mass.), 494; Storrs v. Barker, 6 Johns. Ch. 166; s. c. 10 Am. Dec. 316; Miller v. Bingham, 29 Vt. 82; Crocker v. Crocker, 31 N. Y. 507; Chapman v. Hamilton, 19 Ala. 121; Brinckerhoff v. Lansing, 4 Johns. Ch. 65; s. c. 8 Am. Dec. 528; Lee v. Munroe, 7 Cranch, 366.

In Wilson v. Wall, 6 Wall. 83, it is said that in order to affect a subsequent purchaser with constructive notice, it is not enough that he had the means of obtaining, and might, by prudent caution, have obtained knowledge of the fact; his not obtaining it must have been an act of gross negligence.

² Wilson v. Williams, 25 Tex. 54; Jones v. Smith, 1 Hare, 43; Rogers v. Jones, 8 N. H. 264; Williamson v. Brown, 15 N. Y. 354, 360; Hewitt v. Loosemore, 9 Hare, 449; Flagg v. Mann, 2 Sum. 486; Thompson v. Pioche, 44 Cal. 508, 516; Kerr v. Day, 14 Pa. St. 112.

³ Mullison's Estate, 68 Pa. St. 212. The presumption of notice is conclusive where the purchaser fails to make due inquiry. Maul v. Rider, 59 Pa. St. 167; Littleton v. Giddings, 47 Tex. 109; Loughridge v. Bowland, 52 Miss. 546; Chicago v. Kennedy, 70 Ill. 350; Helms v. Chadbourne, 45 Wis. 60; Bellas v. McCarty, 10 Watts, 13; Hopgood v. Ernest, 3 De G. J. & S. 116, 121.

⁴ Hudson v. Warner, 2 Har. & G. 415; Jackson v. Van Valkenburg, 8 Cow. 260; Wilson v. Williams, 25 Tex. 54.

⁵ See Wilson v. Hunter, 30 Ind. 466; Baker v. Bliss, 39 N. Y. 70; Deason v. Taylor, 53 Miss. 697; Munroe v. Eastman, 31 Mich. 283; Ran-

§228. Possession as Notice.

The rule that actual possession of real estate operates of itself as notice of the rights and interests in the property held by the occupant, equivalent in its effect to a registry of title, obtains generally in this country, with exception confined to only four of five states.¹ The doctrine springs from the apparent, not the true relation that the person in possession bears to the title, and it rests upon the theory that actual and visible possession is a fact of such character and notoriety as cannot properly escape the observation of a subsequent purchaser or incumbrancer, and is in its nature sufficient to put him on inquiry as to the rights of the possessor.² *Prima facie* the possession is of itself suf-

dall v. Silverthorn, 4 Pa. St. 173. An examination of the records may in some cases be requisite, and sufficient. Barnard v. Campau, 29 Mich. 162; Van Keuren v. Cent. Ry., 38 N. J. Law, 165.

¹ Jaques v. Lester, 118 Ill. 246; Moore v. Pierson, 6 Iowa, 279; s. c. 71 Am. Dec. 409; Evans v. Templeton, 69 Tex. 375; s. c. 5 Am. St. Rep. 71; Peasley v. McFadden, 68 Cal. 611; s. c. 10 Pac. Repr. 179; Worcester v. Lord, 56 Me. 265; s. c. 96 Am. Dec. 456; Staton v. Davenport, 95 N. C. 4; Schwallback v. Chicago, *etc.*, 69 Wis. 292; s. c. 2 Am. St. Rep. 740; 34 N. W. Repr. 128; Allen v. Cadwell, 55 Mich. 8; Landes v. Brant, 10 How. (U. S.), 348; Suttan v. Jervis, 31 Ind. 265; s. c. 99 Am. Dec. 631; Vaughan v. Tracy, 22 Mo. 415; s. c. 69 Am. Dec. 471; Forest v. Jackson, 56 N. H. 357; Mayo v. Legget, 96 N. C. 237; Barnes v. Union, 91 Ind. 301; Ranney v. Hardy, 43 O. St. 157; s. c. 1 West. Repr. 52; Nelson v. Nelson, 117 Pa. St. 278; s. c. 11 Atl. Repr. 61; 9 Cent. Repr. 401; Preston v. Nash, 76 Va. 1; Noyes v. Hall, 97 U. S. 34; Massey v. Hubbard, 18 Fla. 688; Grimstone v. Carter, 3 Paige. 421; s. c. 24 Am. Dec. 230; The Aull Savings Bk. v. Aull, 80 Mo. 199; Lee v. Polk Co., 21 How. 493; Baynard v. Norris, 5 Gill, 463; School Dist. v. Taylor, 19 Kan. 287; Westbrook v. Gleason, 79 N. Y. 23; Uhl v. Rau, 13 Neb. 357; Lipp v. Land Syndicate, 24 Neb. 692, 699; s. c. 40 N. W. Repr. 129; Groff v. Ramsey, 19 Minn. 44; Brophy v. Brophy, 15 Nev. 101; Hackwith v. Damron, 1 Mont. 235; Harris v. Arnold, 1 R. I. 125; Byers v. Engles, 16 Ark. 543; Graham v. Nesmith, 24 S. Car. 235; Feirbough v. Masterson, 1 Idaho, 135; Glendenning v. Bell, 70 Tex. 632; s. c. 8 S. W. Repr. 324; Strickland v. Kirk, 51 Miss. 795; Lindsey v. Veasey, 62 Ala. 421; Van Keuren v. Cent. Ry. 38 N. J. L. 165; Sewell v. Holland, 61 Ga. 608; Western Co. v. Peytona, 8 W. Va. 406; Manaudas v. Mann, 14 Or. 450; s. c. 13 Pac. Repr. 449.

² Wickes v. Lake, 25 Wis. 71; Eylar v. Eylar, 60 Tex. 319; Watkins v. Edwards, 23 Tex. 443; Cabeen v. Breckinridge, 48 Ill. 91; Wood v. Farmere, 7 Watts, 382; s. c. 32 Am. Dec. 772; Moss v. Atkinson, 44 Cal. 3; Farmer's Bk. v. Sperling, 113 Ill. 273.

The rule that possession is notice obtains also in England. Taylor v. Stibbert, 2 Ves. 437; Holmes v. Powell, 8 De G. M. & G. 572; Daniels

ficient notice, and whether it be actually known to the other party or not;¹ but this presumptive notice from possession, like that arising from any other fact putting on inquiry, is subject to rebuttal by proof showing that an inquiry duly and reasonably made, failed to disclose any legal or equitable title in the occupant.² A failure to make such inquiry, however, is regarded as an intentional avoidance of the truth which it would have disclosed; and voluntary ignorance under such circumstances effectually deprives the subsequent party of the character of a *bona fide* purchaser.³

§229. Exceptions to the Rule.

By far the larger part of the real estate of the country, at least in value, is continuously in the actual possession of its owners, occupying it either in person or by tenants. The rule that possession is full notice practically dispenses with any real necessity for recording the title. So long as possession accompanies the transmission of title to heirs and successive vendees, registry is not needed, unless it be to guard against the contingency of a possible break in the possession, or to give notice of liens held by third parties. The registry system contemplates that the records shall be the authentic source of information as to the title to real

v. Davidson, 16 Ves. 240; Crofton v. Ormsby, 2 Sch. & Lef. 583; Moreland v. Richardson, 24 Beav. 33; Bailey v. Richardson, 9 Hare, 734.

¹ Hodge v. Amerman, 40 N. J. Eq. (13 Stew.), 99; s. c. 2 Atl. Repr. 257; Edwards v. Thompson, 71 N. C. 177, 179; Shearn v. Robinson, 22 S. Car. 32; Bieman v. White, 23 S. Car. 490; Loughridge v. Bowland, 52 Miss. 546; Hottenstein v. Lerch, 104 Pa. St. 454; Hawley v. Bullock, 29 Tex. 223; Ranney v. Hardy, 43 O. St. 157; Kerr v. Day, 14 Pa. St. 112; Pique v. Arendale, 71 Ala. 91; Smith v. Yule, 31 Cal. 180; s. c. 89 Am. Dec. 167.

² Riley v. Quigley, 50 Ill. 304; s. c. 99 Am. Dec. 516; Jones v. Smith, 1 Hare, 43, 60; Leach v. Ansbacher, 55 Pa. St. 85; Fair v. Stevenot, 29 Cal. 486; Hewitt v. Loosemore, 9 Hare, 449; Rogers v. Jones, 8 N. H. 234; Williamson v. Brown, 15 N. Y. 354; Flagg v. Mann, 2 Sumn. 486. It does not determine what the inquiry shall be, nor of whom it shall be made. Smith v. Miller, 63 Tex. 72.

³ Grimstone v. Carter, 3 Paige, 421, 426; s. c. 24 Am. Dec. 230; Daniels v. Davidson, 16 Ves. 249; Flagg v. Mann, 2 Sumn. 486, 554; Ware v. Lord Egmont, 4 De G. M. & G. 460; Thompson v. Pioche, 44 Cal. 508, 516.

property, without the necessity of recourse to matters of fact, which must always be attended with a greater or less degree of uncertainty.¹ The registry acts do not say that the vendee must record his deed provided he does not take possession; and a failure to record it should be regarded as negligence, even though possession be taken. Purchasers of property lying at any distance from the place of sale, though they have the fullest assurance as to the record title, must purchase at the peril of the property being on the day of purchase in the possession of an adverse claimant. While, as will be seen, some of the courts have carried the doctrine of notice by possession to an unreasonable extent, a few of them have rejected it almost entirely.² In Massachusetts, Maine and Wisconsin, where the registry statutes require "actual" notice, it is held that possession, open and notorious, will not, *per se*, constructively charge notice, and will not have the effect of putting on inquiry unless actually known to the other party.³ This rule obtains also in Louisiana and Connecticut, in which latter state the registry act leaves the effect of notice, or want of it, almost entirely to judicial construction.⁴

¹ "If a deed could be presumed from possession, it would not be necessary to record it. Possession, though evidence of some title, is not necessarily evidence of any particular title, but should put the party on inquiry; and the intent of the registry act is to protect purchasers from secret or concealed conveyances by requiring every deed to be recorded on peril of forfeiture of the estate." *Harris v. Arnold*, 1 R. I. 125.

² In Massachusetts, knowledge on the part of the subsequent purchaser that the premises are in the actual possession of a third person does not alone necessarily charge him with notice of title in the occupant. *Lamb v. Pierce*, 113 Mass. 72; *Pomeroy v. Stevens*, 11 Met. 244; *Dooley v. Wolcott*, 4 Allen (86 Mass.), 406; *Mara v. Pierce*, 9 Gray (75 Mass.), 306; *Sibley v. Leffingwell*, 8 Allen, 584; the latter cases holding, however, that proof of possession may be made in connection with evidence of actual notice.

³ *Worcester v. Lord*, 56 Me. 265; s. c. 96 Am. Dec. 456; *Beal v. Gordon*, 55 Me. 482; *Clarke v. Bosworth*, 51 Me. 528; *Brinkman v. Jones*, 44 Wis. 498; *Lamb v. Pierce*, 113 Mass. 72.

⁴ Thus, where the holder of the legal record title conveys to B. premises to which A. is equitably entitled to a conveyance of, and of which he is in open and adverse possession, B. being ignorant of A.'s

§230. Grantor Remaining in Possession.

Somewhat in the nature of an exception to the general rule are the numerous cases holding that where the grantor remains in possession after a conveyance by him of the premises, such possession is not notice of any title or interest claimed by himself.¹ These cases proceed mainly on the ground of estoppel. The vendor's deed, it is said, is conclusive as to his rights in the premises.² The rule that possession is notice is intended to protect the possessor against the acts and claims of others, but not against his own deed. Having executed the deed and suffered it to go on record, he thereby declares to the world that he has conveyed to the grantee whatever right he has to the land, and that his continuing possession is merely for some temporary purpose.³ If the inquiry suggested by his possession is possession, is held not chargeable with notice by it. *Harrall v. Levarty*, 50 Conn. 46.

"The doctrine has never been recognized by this court that possession under an act of sale not recorded, was sufficient evidence of notice to creditors and subsequent purchasers to defeat the operation of the registry acts." *Eustis, C. J.*, in *Poydras v. Laurans*, 6 La. Ann. 770. See *Swan v. Moore*, 14 La. Ann. 833; *Carpenter v. Allen*, 16 *Id.* 435; *New Orleans v. Labrousche*, 31 *Id.* 839.

¹ *Eylar v. Eylar*, 60 Tex. 319; *Koon v. Trammel*, 71 Iowa, 132; s. c. 32 N. W. Repr. 243; *Quick v. Milligan*, 108 Ind. 419; s. c. 6 West. Repr. 885; *Groton Sav. Bk. v. Beatty*, 30 N. J. Eq. 133; s. c. 19 Alb. L. J. 340; *Denton v. White*, 26 Wis. 679; *Newhall v. Pierce*, 22 Mass. (5 Pick.), 451; *Hoffman v. Blume*, 64 Tex. 334; *Scott v. Gallagher*, 14 Serg. & R. 333; s. c. 16 Am. Dec. 508; *Dawson v. Danbury*, 15 Mich. 489; *Sprague v. White*, 73 Iowa, 670; *Muir v. Jolly*, 26 Beav. 143; *Staples v. Fenton*, 5 Hun. 172; *Wood v. Farmere*, 7 Watts, 382; s. c. 32 Am. Dec. 772; *Hurt v. Cooper*, 63 Tex. 362.

² "Certainly," said *Cooper, C. J.*, in *Hafters v. Strange*, 65 Miss. 323; s. c. 3 South. Repr. 190, "a solemn deed is the equivalent of an assertion by the party grantor that the title is in the grantee; its purpose is to convey and show title; and he who thereby invests another with this universally recognized evidence of right ought not, as against one who deals with that other person upon the faith of such evidence, be permitted to aver to the contrary to his injury."

"The well-settled rule applies to this case that a party is estopped from impeaching or contradicting his own deed, or denying that he granted the premises which his deed purports to convey." *Van Keuren v. Cent. Ry. Co.*, 38 N. J. L. 165, 167.

³ *Bloomer v. Henderson*, 8 Mich. 395, 405; s. c. 77 Am. Dec. 453.

prosecuted to the record, the highest source which the law declares shall exist for the determination of title, and the source which the parties have created as the highest evidence of their respective rights, it is not necessary to examine inferior sources, and inquire whether there are other claims not evidenced as the law directs. To hold otherwise, it is said, would be to strike at the very foundation of the policy upon which the registration laws rest.¹ If objection be made to this reasoning, it must be rather upon the ground that the argument applies with almost equal force against allowing possession to serve the place of registry in any case.

§231. Grantor's Possession is Notice.

Other courts have not been able to see any substantial difference between possession by the grantor and by a third party.² His deed, without reservation, conveys the right of

¹ Eylar v. Eylar, 60 Tex. 319. See also, Rice v. Rice, 2 Drew. 1; White v. Wakefield, 7 Sim. 401; N. Y. Life Ins. Co. v. Cutler, 3 Sand. Ch. 176; Stiffler v. Retzlaff (Pa.), 11 Atl. Repr. 876.

An exception to the rule above has been recognized where possession is relied on as notice of a parol reservation of an easement, upon a conveyance of the legal title to the premises, where such easement is essential to the enjoyment of adjacent premises, the title to which remains in the grantor and possessor of such easement. Randall v. Silverthorn, 4 Pa. St. 173.

Where a grantor is entitled to possession under the terms of a contract by virtue of which he delivered the deed, his possession is not notice of subsequently accruing equities entitling him to a rescission of the contract. McCleerey v. Wakefield (Iowa), 41 N. W. Repr. 210.

² Grimstone v. Carter, 3 Paige, 421, 439; s. c. 24 Am. Dec. 230; Webster v. Maddox, 6 Me. 236; Illinois Central v. McCullough, 59 Ill. 166; Lamoreux v. Meyers, 68 Wis. 34; s. c. 31 N. W. Repr. 331; Hopkins v. Garrard, 7 B. Mon. 312; Wright v. Bates, 13 Vt. 341; Hansen v. Berthelsen, 19 Neb. 433; s. c. 27 N. W. Repr. 595; Stevens v. Castel, 63 Mich. 111. - The vendor remaining in possession after sale is a circumstance tending to show that the alleged sale was really a mortgage, for such possession, if not inconsistent with a sale, is an unusual accompaniment of it. Davis v. Demming, 12 W. Va. 246, 282.

"We can discover no just or rational ground for giving to the fact of possession less significance to a party purchasing the legal title from one not in possession, in consequence of the fact that such occupant had by deed divested himself of the legal title." Pell v. McElroy, 36 Cal. 268, 279.

possession as much so as it does the title. His possession is, therefore, in some sense antagonistic to the deed, and significant of some right or matter not shown by the deed. If the deed, absolute on its face, be in truth but a mortgage, the failure of the grantor to record the defeasance is no greater negligence than the failure of any other person in possession to record some evidence of his title.¹ If the right under which possession is retained arises from some matter subsequent to the deed, the relation of the grantor's possession to it is not materially different from that of a third party's possession to the unrecorded right under which he holds. The grantor has the same right as any other person to subsequently acquire legal or equitable title from his grantee, and as to such right is entitled to the same protection as any other person. He does not assail his own deed by virtue of a claim resting upon some matter entirely *dehors* the record; and his neglect to take, or to put on record, some written evidence of his claim, is no greater than that of any other person who must invoke the doctrine of possession because of a similar negligence.²

¹ Daubenspeck v. Platt, 22 Cal. 330; New v. Wheaton, 24 Minn. 406; Crassen v. Swoveland, 22 Ind. 427; Pell v. McElroy, *supra*. The grantor remaining in possession after sale is a very strong circumstance to show that the transaction is a mortgage, and usually sufficient to put upon inquiry as to that matter. Clark v. Finlon, 90 Ill. 245; Lawrence v. Dubois, 16 W. Va. 443, 461; Streater v. Jones, 3 Hawks. 423; Kemp v. Earp, 7 Ired. Eq. 167, 171; Sellers v. Stallcup, *Id.* 13; Campbell v. Dearborn, 109 Mass. 130; Ransone v. Frayser, 10 Leigh, 592; Strong v. Shea, 83 Ill. 575; Clevinger v. Ross, 109 Ill. 349; Stevens v. Hulin, 53 Mich. 93; s. c. 18 N. W. Repr. 569; Gibson v. Eller, 13 Ind. 124; Thompson v. Banks, 2 Md. Ch. 430; Carter v. Hallihan, 61 Ga. 314. *Contra*, Hurt v. Cooper, 63 Tex. 362.

Possession remaining with the vendor is a circumstance indicating a mortgage. Ruffier v. Womack, 30 Tex. 332, 340, citing Skinner v. Miller, 5 Lit. 84; Hudson v. Isbell, 5 Stew. & Port. 67; Caldwell v. Woods, 3 Watts, 197. If the record suggests a mortgage, this will put upon inquiry, aside from possession. Lewis v. Hinman, 56 Conn. 55; s. c. 13 Atl. Repr. 143.

² See Sherman v. Kane, 86 N. Y. 57; Dorland v. Magilton, 47 Cal. 485; Boggs v. Anderson, 50 Me. 161; McKeehuie v. Hoskins, 23 Me. 230; Metropolitan Bank v. Godfrey, 23 Ill. 579; 2 Dev. on Deeds, §764; Clevinger v. Ross, 109 Ill. 349; Seymour v. McKinstry, 106 N. Y. 230; s. c. 8 Cent. Repr. 72; 12 N. E. Repr. 348; Bennett v. Robinson, 27 Mich. 26.

§232. Possession Referred to the Record Title.

Where a person occupies premises, and the record shows a conveyance under which he would be entitled to the possession, in such case his possession will be referred to the record title, and a subsequent purchaser will not be charged by it with notice of any other undisclosed title or equity which the occupant may have.¹ The possession is a matter tending to excite inquiry, but the fact that the occupant has placed upon the public records written evidence of his right, with the terms of which his possession is consistent, arrests inquiry at that point, and reasonably informs the purchaser that he may rest upon the knowledge thus obtained.² Thus, a wife was entitled to an interest in land by inheritance. A partition was had with other heirs, but the deed made thereupon was to both husband and wife, vesting the title of her portion in them as tenants in common; and as against lien creditors of the husband, her possession was held notice of only an undivided half interest.³ So, where a mortgagee is in possession under a recorded mortgage, a purchaser from the mortgagor will not, by such possession, be charged with notice of an unrecorded conveyance of the equity of redemption from the mortgagor to the mortgagee, unless by the terms of the recorded instrument the mortgagor was entitled to possession at the time of the last purchase.⁴

¹ *Bonnell v. Allerton*, 51 Iowa, 166; *Fargason v. Edrington*, 49 Ark. 207, 214; s. c. 4 S. W. Repr. 763; *Wrede v. Cloud*, 52 Iowa, 371; s. c. 3 N. W. Repr. 400; *Smith v. Yule*, 31 Cal. 180; s. c. 89 Am. Dec. 167; *Brown v. Volkening*, 64 N. Y. 76, 82; *McCleerey v. Wakefield* (Iowa), 41 N. W. Repr. 210.

² *Woods v. Farmere*, 7 Watts. 382; s. c. 32 Am. Dec. 772; *Wade on Notice*, §298.

³ *Farmer's Bank v. Wallace*, 45 O. St. 152; s. c. 12 N. E. Repr. 439; *Gardner v. Earley*, 72 Iowa, 518; s. c. 34 N. W. Repr. 311.

⁴ *Plumer v. Robertson*, 6 Serg. & R. 179; and see *Palmer v. Bates*, 22 Minn. 593; *Patten v. Moore*, 32 N. H. 384; *Great Falls Co. v. Worcester*, 15 N. H. 412; *Fair v. Stevenot*, 29 Cal. 486; *Lincoln v. Thompson*, 75 Mo. 613; *McMechan v. Griffing*, 3 Pick. 149; *Bush v. Golden*, 17 Conn. 594; *Trusdale v. Ford*, 37 Ill. 210.

Where one has been in possession of land for some time without any title, and upon receiving title continues his occupancy as before, with-

§233. Possession Must be Open and Notorious.

All the authorities agree that possession in order to constitute notice must be open and notorious, but they are by no means agreed as to what facts, or character of facts, will be sufficient to constitute the requisite notoriety.¹ The possession, as the general rule is usually stated, must consist in open, visible and unambiguous acts of ownership and occupancy; it must not be equivocal, occasional, or for a special and temporary purpose.² The grazing of sheep and cattle on land, and constructing and fencing round a tank of water thereon is not sufficient;³ nor is the mere cutting of timber thereon from time to time;⁴ nor the use of a vacant town lot by the owner's tenants, on an adjoining lot, for the occasional hanging out of clothes, and the like; nor the overflowing of land by stopping a watercourse below, on a

out any change in its mode and character, this is not sufficient notice to break in upon the registry law. *Emmons v. Murray*, 16 N. H. 398.

Vendee's possession under recorded deed held to give notice of his claim to a part of the tract as to which he had only an unrecorded contract. *Weisberger v. Wisner*, 55 Mich. 246; s. c. 21 N. W. Repr. 331; *contra*, *Wrede v. Cloud*, 52 Iowa, 371.

¹ Whether or not the possession is of such character as to affect a subsequent purchaser, is a question of fact for the jury. *Ponton v. Ballard*, 24 Tex. 619.

² *Evans v. Templeton*, 69 Tex. 375; s. c. 5 Am. St. Rep. 71; *Schwallback v. Chicago, etc.*, 69 Wis. 292; s. c. 2 Am. St. Rep. 740; *Ranney v. Hardy*, 43 O. St. 157; *White v. White*, 105 Ill. 313; *Beaubrien v. Henderson*, 38 Kan. 471; s. c. 15 Pac. Repr. 184; *Parker v. Baines*, 65 Tex. 605; *Hughes v. United States*, 4 Wall. 232; *Blankenship v. Douglass*, 26 Tex. 225; s. c. 82 Am. Dec. 608; *Smith v. Yule*, 31 Cal. 180; s. c. 89 Am. Dec. 167; *Brown v. Volkening*, 64 N. Y. 76; *Butler v. Stevens*, 26 Me. 484; *Treize v. Lacy*, 22 Kan. 742; *Worcester v. Lord*, 56 Me. 265; s. c. 96 Am. Dec. 456; *Pope v. Allen*, 90 N. Y. 298; *Jefferson v. Oyler*, 82 Ind. 394; *Taylor v. Kelley*, 3 Jones Eq. 240; *Lincoln v. Thompson*, 75 Mo. 613; *Ely v. Wilcox*, 20 Wis. 523; s. c. 91 Am. Dec. 436; *Patten v. Moore*, 32 N. H. 382; *Redden v. Miller*, 95 Ill. 336.

³ *Murphy v. Welder*, 58 Tex. 235; *Coleman v. Barklew*, 27 N. J. L. (3 Dutch.), 357; *Trustees v. Wheeler*, 59 Barb. 585; *Sanford v. Weeks*, 38 Kan. 319; s. c. 16 Pac. Repr. 465.

⁴ *Holmes v. Stout*, 10 N. J. Eq. (2 Stockt. Ch.), 419; 3 Green's Ch. 492; *Bartlett v. Simmons*, 4 Jones Law, 295; *Watts v. Griswold*, 20 Ga. 732; *Miller v. Platt*, 5 Duer, 272; *Green v. Harmon*, 4 Dev. Law, 158; except swamp land, valuable only for its timber. *Simpson v. Blount*, 3 Dev. Law, 34.

different tract.¹ On the other hand, it is held that inclosure is not necessary, where there are other appropriate acts of occupancy;² that clearing an acre out of sixty acres of heavily timbered land, and renting it to a person residing on an adjoining tract, who cultivated it, is sufficient;³ that growing and cutting willows upon the land every year, for basket making, is sufficient;⁴ and finally that running a plowed furrow around a tract of prairie land will suffice.⁵

¹ *Green v. Harmon*, 4 Dev. Law, 158. Nor possession on a different tract. *Robinson v. Lake*, 14 Iowa, 424.

² *Feirbough v. Masterson*, 1 Idaho, 135; *Ewing v. Burnett*, 11 Pet. 53; *Ellicott v. Pearl*, 10 Pet. 442. In the first of these cases, the character of the possession requisite to charge notice is very fully discussed by Mr. Justice Cummins.

³ *Wickes v. Lake*, 25 Wis. 71, with an able dissenting opinion by Chief Justice Gibson. Living in one room of a building and collecting rents from tenants in other rooms, is sufficient. *Phelan v. Brady*, 19 Abb. N. Cas. 289.

⁴ *Krider v. Lafferty*, 1 Whart. 303. See also, *Banner v. Ward*, 12 Fed. Repr. 820. The possession may be according to the custom of the country, and the use for which the land is adapted. *Criswell v. Artemus*, 7 Watts, 580. Thus, in North Carolina, the annual making of turpentine on the land is actual possession, it being fit for no other purpose. *Bynum v. Carter*, 4 Ired. 310; *Green v. Harmon*, 4 Dev. Law, 158, 161.

⁵ *Buck v. Holt*, 74 Iowa, 294; s. c. 37 N. W. Repr. 377. Laying down a sidewalk, and the putting up of a real estate agent's signboard, announcing the vacant lot for sale, held a sufficient possession to charge notice. *Hatch v. Bigelow*, 39 Ill. 546. So the erection of a church-house is notice of the title of the church to the lot on which it stands. *Randolph v. Meeks*, Mart. & Y. 58; *Macon v. Sheppard*, 2 Humph. 335; *Singleton v. School Dist. (Ky.)* 10 S. W. Repr. 793.

Where there is actual possession, the extent and value of the improvements are immaterial. *Taylor v. Lowenstein*, 50 Miss. 278; *Phillips v. Pitts*, 78 Ill. 72.

The rule that possession is notice does not apply to a mere intruder having no claim of right. *Wright v. Wood*, 23 Pa. St. 120, 130; *Gill v. Hardin*, 48 Ark. 409; s. c. 3 S. W. Repr. 519; it must be hostile, *Turney v. Chamberlain*, 15 Ill. 271; *Thompson v. Felton*, 54 Cal. 547; and in order to work a disseizin, inconsistent with the claim of others. *Am-brose v. Raley*, 53 Ill. 506; *Sparrow v. Hovey*, 44 Mich. 63.

User of a road constitutes notice of an easement. *Campbell v. Indianapolis Ry.*, 11 N. E. Repr. 482; 110 Ind. 490; *Robinson v. Thrailkill*, 110 Ind. 117; *Chicago v. Hay*, 119 Ill. 493; but grading begun, and afterwards suspended, on a tract to which a railroad company had no record title, held not to charge notice, the grading not being shown to indicate its purpose. *Masterson v. West End Ry.*, 5 Mo. App. 64.

§234. Possession Must be Actual.

A mere constructive possession on the part of the equitable claimant cannot serve the purpose of notice as against the legal record title, since the latter draws to itself, as matter of law, the constructive possession of the land.¹ It must be an actual possession. Yet neither actual occupation, cultivation nor residence is indispensably necessary to constitute actual possession, when the property is so situated as not to admit of any permanent, useful improvement, and the continual claim of the party is evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.² There is a difference between that bare possession, without any claim of legal or equitable title in the land, such as may be eventually asserted under the statutes of limitation, and possession under color or claim of title. In the case of a naked trespasser, the possession must be defined by actual occupancy or inclosure, or at least by the existence of visible and definite boundary marks, since otherwise, unless it be by a statutory limitation of the amount that bare possession will give title to, there is nothing by which the possession can be constructively extended an inch beyond the actual occupancy.³ But where the possession is by virtue of some

¹ Co. Lit. 153; 2 Prest. Abst. 282; *Craig v. Cartwright*, 65 Tex. 413; *Barr v. Gratz*, 4 Wheat. 213; *Wyman v. Brown*, 50 Me. 160; *Parker v. Baines*, 65 Tex. 605; *Turner v. Stephenson* (Mich.), 40 N. W. Repr. 735; *Ivey v. Petty*, 70 Tex. 178; s. c. 7 S. W. Repr. 798; *Effinger v. Lewis*, 32 Pa. St. 367.

² *Ewing v. Burnett*, 11 Pet. 53; *Angell on Limitations*, §400; *Barclay v. Howell*, 6 Pet. 513; *Royal v. Lisle*, 15 Ga. 545; *Langworthy v. Myers*, 4 Iowa, 18.

Where there can be neither actual permanent occupation nor residence, on account of the incapacity of the property to receive any permanent improvement, these acts will not be necessary. *Ellicot v. Pearl*, 10 Pet. 412; *Blood v. Wood*, 1 Met. 528; *Bailey v. Carleton*, 12 N. H. 9; *La Frombois v. Jackson*, 8 Cow. 604; *Faught v. Holway*, 50 Me. 24; *Ford v. Wilson*, 35 Miss. 504.

³ *Thomas v. Kelley*, 13 Ired. 43; *Scott v. Elkins*, 83 N. C. 424; *Green v. Liter*, 8 Cranch, 229; *Johnston v. Irwin*, 3 Serg. & R. 291; *Bracken v. Jones*, 63 Tex. 184.

unrecorded instrument, or equitable claim of title, there is not in the nature of the case any reason why the rule as to its character and sufficiency should be different, whether it is invoked to charge notice or to support the statute of limitations. If the claim is by virtue of an unregistered conveyance, the possession, in either case, is usually held to extend to the limits defined in the written instrument, the same as if it were of record.¹ Where the claim is not evidenced in writing, it is a difficult matter to fix upon any criterion by which to determine how far the possession of land may extend beyond the part actually inclosed, or appropriated in some visible manner; and the question must be determined in any given case very largely by the particular facts relating to the amount and character of the land, and the manner in which possession is exercised.² In some

¹ *Craig v. Cartwright*, 65 Tex. 413; *Cowen v. Loomis*, 91 Ill. 132; *Taylor v. Moseley*, 57 Miss. 544; *Emmons v. Murray*, 16 N. H. 385; *Moreland v. Richardson*, 24 Beav. 33; *Waters v. Connelly*, 59 Iowa, 217; s. c. 13 N. W. Repr. 82; *Morrison v. March*, 4 Minn. 422; *Doyle v. Stevens*, 4 Mich. 87; *Farmer's Loan Co. v. Maltby*, 8 Paige, 361; *Clapp v. Bromaghan*, 9 Cow. 552; *Gale v. Shillock (Dak.)*, 29 N. W. Repr. 661.

² It is generally necessary to reserve part of the woodland, and good husbandry forbids the improvement of the whole. Where possessions are not large, and are in the neighborhood of others with well-defined boundaries, the principle that the constructive possession should extend to the boundaries of the paper title may well apply, but the application of the same rule to cases of large, uncultivated tracts, would be mischievous indeed. *Jackson v. Woodruff*, 4 Cow. 276; *Chandler v. Spear*, 22 Vt. 406; *Pepper v. O'Dowd*, 39 Wis. 538, 550.

The part not actually possessed must be for use with, or subservient to, that actually possessed, and have some necessary connection with it, and be only so much as is reasonable and proper for that purpose according to the custom of the country. *Thompson v. Burhans*, 79 N. Y. 100; *Hickman v. Link (Mo.)*, 10 S. W. Repr. 600.

Where the defendant produced no written title, but relied solely on possession with claim of title, he was held limited to that part under actual improvement. *Jackson v. Warford*, 7 Wend. 62.

Where the holder of the elder title subsequently takes actual possession, it will extend constructively to every part of the tract not actually inclosed and improved by an occupant under an adverse junior title. *Anderson v. Jackson*, 69 Tex. 346; s. c. 6 S. W. Repr. 575; *Parker v. Baines*, 65 Tex. 605, citing *Evitts v. Roth*, 61 Tex. 81; *Frisby v. Withers*, 61 Tex. 134; *Whitehead v. Foley*, 28 Tex. 239; *Horton v. Crawford*, 10

states the statutes of limitation have not only prescribed that a shorter possession shall bar the legal owner where it is by virtue of an unrecorded written instrument, but have also defined the character of possession requisite in each character of case, in substantial accord with the distinctions above noted.¹ Where there is a dispute as to boundary

Tex. 338; *Clarke v. Courtney*, 5 Pet. 319; overruling *Jones v. Menard*, 1 Tex. 771, and distinguishing *Peyton v. Barton*, 53 Tex. 298.

Even actual possession has been held insufficient where the building occupied was in the corner of the lot, near other similar buildings occupied by employes of the owner of the entire lot, who had sold the corner by parol. *Billington v. Welsh*, 5 Binn. 129; s. c. 6 Am. Dec. 406; and see *Pope v. Allen*, 90 N. Y. 298; *Hanrick v. Thompson*, 9 Ala. 409.

¹ For good statutory definitions of possession under written instrument or judgment, and under claim not based on any written instrument, see Rev. Stats. N. Y., vol. 2, part 2, ch. 4 title 2; *Hacker v. Horlemus* (Wis.), 41 N. W. Repr. 965. The Texas statute provides that adverse possession *shall be construed* to embrace not more than 160 acres, including the improvements, or a greater number, if actually inclosed; but if held under some written memorandum of title, other than a deed, which fixes the boundaries, *and is duly registered*, the possession will be co-extensive with such boundaries. Rev. Stats., §3195. Under this statute, the possession of a naked trespasser will extend to 160 acres, formerly 640, though it be not inclosed. *Craig v. Cartwright*, 65 Tex. 413, 423. "The present law, as did not the former, makes registration of written memorandum of title other than a deed, necessary to enable the holder to have his possession construed to be co-extensive with the boundaries specified in his memorandum of title." *Id.*, per Mr. Justice Stayton, citing in support of the first proposition above, *Ward v. Drouthett*, 44 Tex. 369; *Pearson v. Boyd*, 62 Tex. 541; *Mooring v. Campbell*, 47 Tex. 37; *Charle v. Saffold*, 13 Tex. 112; *Bracken v. Jones*, 63 Tex. 184.

"The legal effect and extent of an adverse possession depends, of course, on the character of title by which it is sought to be sustained." *Gillespie v. Jones*, 26 Tex. 343, 347. "If the person making the entry had a right of entry as to part of the land, and not as to the residue, his entry upon that part to which he had right would not be construed to give him possession to that part to which he had no right." Ch. J. Bozle, in *Fox v. Hinton*, 4 Bibb. 559.

In *Parker v. Baines*, 65 Tex. 604, is an able opinion by Ch. J. Willie, affirming the rule that as the elder title draws to it the constructive possession, where there is a junior survey which conflicts in part with the elder, possession under the junior title, in order to oust the constructive possession of the elder, must be an actual, visible possession of the part in conflict; occupancy of that part of the junior survey not in conflict, will not suffice; citing *Bunton v. Cardwell*, 53 Tex. 408; *White v. Burnly*, 20 How. (61 U. S.), 225. And see also, *Dobbins v. Stevens*, 1 Dev. & Bat. Law, 6; *Mitchell v. Churchman*, 4 Humph. 218; *Langdon*

lines, the possession by either disputant, of that part of his land not involved in the controversy, is not notice of claim to the disputed part.¹

§235. Joint Possession as Notice.

A joint or mixed possession will not suffice as notice of adverse claim to an owner of the legal title. Where two are in possession, the seizin follows the title, and there can be no disseizin until the rightful owner is altogether deprived of possession.² Where the grantor and grantee were in joint possession at the time of the execution of a deed of the premises, and there was no change of possession afterwards, such possession is held not to charge a third person with notice of the deed.³ The possession of a tenant in common is not adverse to that of his co-tenant, and cannot of itself serve as notice to him of an adverse claim to the entire tract.⁴ The joint possession of husband and wife will impart notice of her equities as against all persons not

v. Potter, 3 Mass. 219; Gittings v. Hall, 2 H. & Johns. 112; Hull v. Powell, 4 Serg. & R. 465; Livingston v. Peru, 9 Wend. 511; Scott v. Elkins, 85 N. C. 424; Barr v. Gratz, 4 Wheat. 213.

¹ Wright v. Lassiter, 71 Tex. 640.

² Bell v. Twilight, 22 N. H. 500; Hawk v. Senseman, 6 Serg. & R. 21; Cahill v. Palmer, 45 N. Y. 484; Peterson v. McCullough, 50 Ind. 35; Crispen v. Hannavan, 50 Mo. 536; Thompson v. Pioche, 44 Cal. 508; Stevens v. Hollister, 18 Vt. 294; Whittington v. Wright, 9 Ga. 23; Colby v. Kenniston, 4 N. H. 262.

³ McCarthy v. Nicrosi, 72 Ala. 332; s. c. 47 Am. Rep. 418; Butler v. Stevens, 26 Me. 484.

⁴ A tenant in common purchased his co-tenant's interest in the land, but failed to record the deed till after the sale of the latter's interest on execution. At the time he received the deed, he was in possession, and afterwards made improvements on the land, but the execution creditor did not know that they were made exclusively by him. *Held*, that his possession was not notice of his rights under the deed. May v. Sturdivant (Iowa), 39 N. W. Repr. 221. As to adverse possession by co-tenants, see Cryer v. Andrews, 11 Tex. 170; Dyer v. Witler, 89 Mo. 81; Brown v. Volkenning, 64 N. Y. 76; Moody v. Butler, 63 Tex. 210; Dugan v. Follett, 100 Ill. 581; McQuiddy v. Ware, 67 Mo. 74; Florence v. Hopkins, 46 N. Y. 182; Rigg v. Fuller, 54 Ala. 141; Faulke v. Bond, 41 N. J. L. 527; Millard v. McMullen, 68 N. Y. 345; Acuirre v. Alexander, 58 Cal. 21; Bailey v. Trammell, 27 Tex. 317; Ranney v. Hardy, 43 O. St. 157.

claiming under the husband.¹ In some cases it has been held to charge notice of her rights to claimants under him,² and in others not;³ the character of the wife's title and her rights of property under the statute doubtless entering largely into the determination of the respective cases. As the domicile and residence of the husband is by law that of the wife, equity could not well deny to her possession less efficacy in the protection of her property rights, where they are recognized by law, than it accords to that of the husband, or of others, even though it should be necessary to make her case an exception to the rule.

§236. Possession by Tenant is Notice.

Where possession is held to charge notice, such possession may, as the general rule, be constituted as effectually by the occupation of a tenant or lessee as by that of the landlord.⁴ Possession puts on inquiry, and inquiry of the tenant

¹ Iowa Loan & Trust Co. v. King, 58 Iowa, 593; s. c. 12 N. W. Repr. 595.

² Where a land certificate had been transferred by the husband, the possession of husband and wife occupying the land located by virtue of it, *held* notice to the assignee to whom patent issued. Allen v. Cadwell, 55 Mich. S; s. c. 20 N. W. Repr. 692; Campbell, J., dissenting. See, also, Brunson v. Brooks, 68 Ala. 248; Farmer's Bank v. Wallace, 45 O. St. 152; s. c. 12 N. E. Repr. 439.

³ Neal v. Perkerson, 61 Ga. 345. The possession, with the husband, of a polygamous wife is not notice of a secret agreement with him by virtue of which she is to have one-half the property. Townsend v. Hooper, 2 Utah. 548; Townsend v. Little, 109 U. S. 509. See Gardner v. Early, 72 Iowa, 518; s. c. 34 N. W. Repr. 311; Fasset v. Smith, 23 N. Y. 252.

Where the owner of a tract on which a saw-mill, forge, dwelling and tenant-houses were situated, sold a corner of the tract by parol, the actual occupancy by the grantee, of a house on such corner—it not being separated from the other houses near it by any fence or other inclosure—was held so far a mixed and apparently joint possession as not to charge notice. Billington v. Welch, 5 Binn. 129; s. c. 6 Am. Dec. 406.

⁴ Glendenning v. Bell, 70 Tex. 633; s. c. 8 S. W. Repr. 324; Woodson v. Collins, 56 Tex. 175; Liebrick v. Stahle, 68 Iowa, 515; s. c. 27 N. W. Repr. 490; Graham v. Nesmith, 24 S. Car. 285; Bratton v. Rogers, 62 Miss. 281; Taylor v. Moseley, 57 Miss. 544; Edwards v. Thompson, 71 N. C. 177; Thompson v. Pioche, 44 Cal. 503; Cunningham v. Pattee, 99 Mass. 248; Bank v. Godfrey, 23 Ill. 579; Conlee v. McDowell, 15 Neb.

cannot reasonably fail to develop information leading to a knowledge of the landlord's title which in good faith cannot be disregarded.¹ The English rule, it seems, limits the effect of notice by the tenant's possession to the rights of the occupant and those claiming under him;² and there are a very few decisions by American courts to the same effect.³ Possession by the tenant or lessee is constructive notice not only of the tenant's rights and interests directly growing out of or connected with the lease itself, but also of all rights and interests which he may have acquired by other and collateral agreements, as, for example, from a contract to convey the land, or to renew the lease, and the like.⁴ The possession of a tenant cannot constructively charge the landlord or a purchaser from him with notice of any claim by the tenant adverse to the title of the landlord. In such case nothing short of a repudiation of the tenancy brought home to the landlord or purchaser can charge notice of the tenant's title; even the registration of a deed to the tenant being ineffectual for that purpose.⁵

184; s. c. 18 N. W. Repr. 60; *Wright v. Wood*, 23 Pa. St. 170; *Morrison v. March*, 4 Minn. 422; *Bank v. Flagg*, 3 Barb. Ch. 316; *Watkins v. Edwards*, 23 Tex. 213; *Peasley v. McFadden*, 68 Cal. 611; s. c. 10 Pac. Repr. 179.

¹ *Graham v. Nesmith*, 24 S. Car. 285; *Dickey v. Lyon*, 19 Iowa, 544.

² *Jones v. Smith*, 1 Hare, 43, 63; *Hanbury v. Litchfield*, 2 My. & K. 629; *Barnhart v. Greenshields*, 9 Moore P. C. 33.

³ *Roll v. Rea*, 50 N. J. L. 266; s. c. 12 Atl. Repr. 905; *Flagg v. Mann*, 2 Sumn. 486; *Beatie v. Butler*, 21 Mo. 313; *Jaques v. Weeks*, 7 Watts. 261, 272.

⁴ 2 Pom. Eq. Jur., §625; *Taylor v. Stibbert*, 2 Ves., Jr., 437; *Daniels v. Davison*, 16 Ves. 249; *Kerr v. Day*, 14 Pa. St. 112; *Knight v. Bowyer*, 23 Beav. 600-641; *Cunningham v. Pattee*, 99 Mass. 248, 252; *Stewart v. Long Island Ry.*, 102 N. Y. 601; s. c. 4 Cent. Repr. 115; 8 N. E. Repr. 200.

⁵ *Udell v. Peak*, 70 Tex. 547; s. c. 7 S. W. Repr. 786; *Carter v. La Grange*, 60 Tex. 638. If one known to be a tenant in possession under a vendor afterwards asserts title as against a purchaser, under an unrecorded title from a former vendor, about which he was ignorant when he accepted the tenancy, his occupancy of the land cannot charge the purchaser with notice of any right in him inconsistent with his tenancy. *Smith v. Miller*, 63 Tex. 72.

Possession by a tenant, continued after the expiration of his lease, will be referred to his original tenancy, and not to any unrecorded

§237. Possession must be Existing or Continuous.

Successive and occasional entries on land will not constitute a sufficient possession to charge notice, or to work a disseizin.¹ The occupant who is without any record title must "keep his flag flying."² If the premises are vacant at the time the subsequent purchaser's rights accrue, he cannot be affected by any notice arising from the prior occupancy of third parties; since if possession is to be held as the assertion of a claim of title, its surrender must be held as the abandonment of the claim.³ The purchaser is bound to inquire only of those on the land at the time of his purchase.⁴ The rule does not of course apply in the exceptional cases before mentioned where actual occupancy is not possible, or not required.⁵ The possession will continue its original character, and charge notice only of such right, if any, as the occupant claimed at the time it was taken.⁶

claim of right or title in himself. *Claiborne v. Holmes*, 51 Miss. 146; *Stone v. Cook*, 79 Ill. 424; and see, also, *Emmons v. Murray*, 16 N. H. 398.

¹ *Kendall v. Lawrence*, 22 Pick. 540; *Meehan v. Williams*, 48 Pa. St. (12 Wright), 238; *Armstrong v. Morrill*, 14 Wall. (81 U. S.), 146; *Foulke v. Bond*, 12 Vroom, 527; *Moore v. Thompson*, 69 N. C. 121; *Wing v. Hall*, 47 Vt. 182.

² *Denham v. Hollman*, 26 Ga. 191; *Gudger v. Henseley*, 82 N. C. 56; *Kendall v. Lawrence*, 22 Pick. (39 Mass.), 540.

³ *Campbell v. Brackenridge*, 8 Blackf. 471; *Ehle v. Brown*, 31 Wis. 405.

⁴ *Jones v. Smith*, 1 Hare, 43, 62; *Boggs v. Varner*, 6 Watts & S. 474; *Meehan v. Williams*, *supra*; *Miles v. Langley*, 1 Russ. & My. 39; *Hewes v. Wiswell*, 8 Me. 94; *Brown v. Volkenning*, 64 N. Y. 76.

⁵ And in England a prior possession, not being then actually maintained, or the reception of rents without actual occupancy, while not sufficient to constructively charge notice, will, if brought to the purchaser's knowledge, be sufficient to put him on inquiry. 2 Pom. Eq. Jur. 621, citing *Knight v. Bowyer*, 2 DeG. & J. 421; s. c. 23 Beav. 609.

⁶ *Emmons v. Murray*, 16 N. H. 398; *Stone v. Cook*, 79 Ill. 424. Where the title fails under which possession is being held, such possession cannot be invoked to charge notice of an after-acquired title from the same grantor whose quit-claim constituted the prior defective title. *Rupert v. Mark*, 15 Ill. 540; *N. Y. Life Ins. Co. v. Cutler*, 3 Sandf. Ch. 176. A mere temporary absence from home will not affect the character of the possession. *Kendall v. Lawrence*, 22 Pick. 540.

§238. Notice to Agent is Notice to Principal.

Notice to an agent of an unrecorded title or equity is to the same extent notice to his principal, who is not permitted to avail himself of the advantage of what the agent knows, without the disadvantage.¹ To allow this would be to afford extraordinary facilities to those desiring to take fraudulent advantage of the law relating to actual notice of equitable interests and conveyances not of record, as the agent or attorney engaged to investigate the title or transact the business could be conveniently blind to whatever seemed likely to develop an adverse claim outside of the public records, and conveniently dumb in regard to disclosing such matters to his principal.² The law presumes the agent has done his duty in communicating to his principal all information within his knowledge relative to the title of the property involved, concerning which it would be obligatory on the principal himself to inquire or act if he were transacting the business in person.³ It makes no difference whether the

¹ Bigley v. Jones, 114 Pa. St. 510; s. c. 7 Atl. Repr. 54; Dickerson v. Bowers, 42 N. J. Eq. 295; s. c. 11 Atl. Repr. 142; 7 Cent. Repr. 372; Papot v. S. W. Ry. Co., 74 Ga. 296; Broughton v. Foster, 69 Ga. 714; Stokes v. Riley, 121 Ill. 166; s. c. 11 N. E. Repr. 877; Young v. Shauer, 73 Iowa, 555; s. c. 5 Am. St. Rep. 701; 35 N. W. Repr. 629; Collins v. Cooper, 65 Tex. 460; Kauffman v. Robey, 60 Tex. 304; Smith v. Ayer, 101 U. S. 320; Seixas v. Citizen's Bank, 38 La. Ann. 424; Astor v. Wells, 4 Wheat. 466; The Distilled Spirits, 11 Wall. (78 U. S.), 356; Meier v. Blume, 80 Mo. 179; Suit v. Woodhall, 113 Mass. 391; Farrington v. Woodward, 82 Pa. St. 259; Ward v. Warren, 82 N. Y. 265; Allen v. Poole, 54 Miss. 323; Tucker v. Tilton, 55 N. H. 223; Tagg v. Tenn. Nat. Bk., 9 Heisk. 479; First Nat. Bk. v. Town of Milford, 36 Conn. 93; Sartwell v. North, 144 Mass. 188; s. c. 10 N. E. Repr. 824; Matthews v. Riggs, 80 Me. 107; s. c. 13 Atl. Repr. 48; s. c. 5 N. Eng. Repr. 863; Barbour v. Wiehle, 116 Pa. St. 308; s. c. 9 Atl. Repr. 520; Fuller v. Bennett, 2 Hare, 394; Stanley v. Chamberlain, 39 N. J. L. 565; Gilbert v. Jess, 31 Wis. 110; Van Hook v. Walton, 28 Tex. 59.

² Wade on Notice, §32. "The principle on which the doctrine rests is this: that my solicitor is *alter ego*; he is myself; I stand in precisely the same position as he does in the transaction, and, therefore, his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage." Boursot v. Savage, L. R., 2 Eq. 134, 142.

³ The general rule that the principal is bound by the agent's knowledge, is based on the principle of law, that it is the agent's duty to com-

notice be actual and express, or such as the law will constructively impute by virtue of facts deemed sufficient to put upon inquiry; whatever would, in the given case, charge the principal acting himself in the matter, will charge him acting through an agent.¹ Notice to the agent being established, it is then imputed to the principal upon a legal presumption that is not rebuttable, except in cases of fraud by the agent in his dealing with the principal.²

§239. Scope of the Rule—Partners—Trustees—Officers—Husband, etc.

Notice to one partner is notice to the firm;³ and notice to one of several grantees in a joint conveyance, or in a joint purchase, though not all named in the deed, is notice to all,⁴ if the one affected with notice acts in the negotiation as the agent of the others.⁵ Notice to a trustee of equities af-

communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty." Bradley, J., in *The Distilled Spirits*, 11 Wall. 356.

¹ *Bank of U. S. v. Davis*, 2 Hill, 451; *Barnes v. McClinton*, 3 Penn. 67; *Kennedy v. Green*, 3 My. & K. 699; *Hart v. Farmer's Bk.* 33 Vt. 252.

Notice to one of several trustees is usually sufficient. *Meux v. Bell*, 1 Hare, 73; and to one of several agents, as the obligation to communicate the knowledge to the principal rests as strongly upon one as upon all collectively. *Fulton Bk. v. N. Y. Canal Co.*, 4 Paige, 127; *North River Bk. v. Aymer*, 3 Hill, 262.

² *Williamson v. Brown*, 15 N. Y. 354; *Suit v. Woodhall*, 113 Mass. 391; *Owens v. Roberts*, 36 Wis. 258; *Bradley v. Riches*, L. R., 9 Ch. D. 189; *Hewitt v. Loosemore*, 9 Hare, 449.

³ *Cunningham v. Woodbridge*, 76 Ga. 302; *Stevens v. Goodenough*, 26 Vt. 676; *Travis v. Milne*, 9 Hare, 141.

⁴ *Littleton v. Giddings*, 47 Tex. 109; *Stanley v. Green*, 12 Cal. 148. "In taking the conveyance in the name of his associates," said Judge Field, in the latter case, "he must be considered as having acted as their agent, and notice to him was equally notice to them. Story's Eq., §§408, 409. Indeed, it would be singular if the legal effect of notice could be obviated by so easy a subterfuge as the insertion of the names of other parties in the conveyance."

⁵ If a purchase of property be made by two or more persons jointly, or as tenants in common, one of them will not be charged with notice of an incumbrance or conveyance affecting the title, known only to the other, unless the one having such knowledge has, by virtue of partnership relations, or some other means, been made the agent of the

fecting the trust property will usually, though not in all cases, be equivalent to notice to the *cestui que trust*.¹ The rule applies also to cashiers, directors and other officers of corporations while engaged in transacting business of the corporation.² Notice to the officer levying an attachment has been held notice to the plaintiff in the attachment suit.³ Notice to the husband is notice to the wife, where he is acting as her agent in the matter to which the notice relates;⁴

others. *Rippetoe v. Dwyer*, 65 Tex. 703; *Parker v. Kane*, 21 Wis. 27; *Wiswall v. McGowan*, 2 Barb. 281; s. c. *Hoffman's Ch.* 125; *Snyder v. Sponable*, 1 Hill, 570; s. c. 7 Hill, 427; *Flagg v. Mann*, 2 Sumn. 486, 534.

¹ *Myers v. Ross*, 3 Head, 59; *Pope v. Pope*, 40 Miss. 516; *Stevens v. Goodenough*, 26 Vt. 676; *Wise v. Wise*, 2 Jones & Lat. 403; *Willes v. Greenhill*, 4 De G. F. & J. 147, 150. Where the conveyance is merely to secure a debt, and the trustee is appointed solely by the grantor, the rule will not be applied. *Fargason v. Edrington*, 49 Ark. 207, 215; *Wade on Notice*, §676, citing *Johnson Co. v. Thayer*, 5 Cent. Law J. 245; *Curtis v. Leavitt*, 15 N. Y. 194.

² *Nat. Security Bk. v. Cushmann*, 121 Mass. 490; *Wethers v. Sowles*, 32 Fed. Repr. 758; *Tagg v. Tenn. Nat. Bk.*, 9 Heisk. 479; *Branch Bk. v. Steele*, 10 Ala. 916; *New Hope Co. v. Phoenix Bk.*, 3 N. Y. 156; *Smith v. Water Com'rs*, 38 Conn. 208; *Bank of America v. McNeil*, 10 Bush, 54; *Bank of New Milford v. Town of New Milford*, 36 Conn. 93.

But where the general superintendent of a corporation conveyed to it with warranty land bought by him with actual notice of a prior lease, it was held that his knowledge could not be imputed as notice to the corporation. *Wickersham v. Chicago, etc.*, 18 Kan. 481; s. c. 26 Am. Rep. 784.

³ *Tucker v. Tilton*, 55 N. H. 223. See *contra*, *Jones on Chat. Mort.*, §311, citing *Stowe v. Meserve*, 13 N. H. 46; *McCarthy v. Grace*, 23 Minn. 182. If notice to the sheriff were held sufficient, it would almost render nugatory the statute requiring record, for it would only be necessary, where any one came to attach, that notice then be given. *Stowe v. Meserve*, *supra*. Notice to the attorney in the suit is sufficient. *Polk v. Cosgrove*, 4 Biss. 437.

⁴ Where the husband takes no part in the negotiation, notice to him affecting land bought by the wife is of no avail. *Satterfield v. Maloue*, 35 Fed. Repr. 445. Where a deed is made to husband and wife as joint tenants, notice to the husband held not notice to her, the consideration moving entirely from the wife. *Snyder v. Sponable*, 1 Hill, 567; s. c. 7 Hill, 427; But where the wife accepts and profits by the act of an agent, she must take it as a whole, and will be affected by any knowledge on his part, or notice to him, that would have invalidated the sale had he bought for himself. *Duke v. Balme*, 16 Minn. 306; *Gardner v. Earley*, 72 Iowa, 518; s. c. 34 N. W. Repr. 311; *Clark v. Fulton*, 39 Conn. 238; *Willes v. Greenfield*, 4 DeG. F. & J. 147, 150.

but notice to him is not necessarily notice to her because of their relation as husband and wife, although some of the cases seem to proceed on this theory.¹

§240. Character of the Agency.

It is not every agent whose reception of notice will charge the principal. The notice must relate to a matter within the scope of the agent's authority.² The power of the agent to bind the principal will usually furnish a criterion by which the scope of the agent's authority may be determined. Where he cannot bind his principal by acts beyond the limits of his authority, a notice beyond these limits is equally nugatory.³ If the agent be employed to do a merely ministerial act, as to record a mortgage, or to procure the execution of a deed, notice to him will not charge the principal.⁴ A casual application or limited question to an attorney at law for advice or information as to the title of land will not charge one with notice of all the knowledge the attorney may possess about the matter.⁵

§241. Notice in Same Transaction.

It is further established, as a general rule, that the notice, in order to constructively charge the principal, must have been received by the agent while engaged for the principal in the same transaction to which it relates, or in the

¹ *Bennett v. Titherington*, 6 Bush, 192; *Conway v. Cook*, 66 Md. 290. See *Pringle v. Dunn*, 37 Wis. 440; s. c. 19 Am. Rep. 772.

² *Roach v. Karr*, 18 Kan. 529; *Weisser v. Denison*, 10 N. Y. 68; *Grant v. Cole*, 8 Ala. 519; *Barbour v. Wiehle*, 116 Pa. St. 308; s. c. 9 Atl. Repr. 520.

³ 2 Pom. Eq. Jur., §668; *Spadone v. Manvel*, 2 Daly, 263; *Brown v. Bankers, etc., Co.*, 30 Md. 39; *Wilson v. Conway*, 4 R. I. 141, 152.

⁴ *Anketel v. Converse*, 17 O. St. 11; *Hoppock v. Johnson*, 14 Wis. 303; *Wyllie v. Pollen*, 3 DeG. J. & S. 596, 601; s. c. 32 L. J. (N. S.), 782; *Astor v. Wells*, 4 Wheat. 466.

⁵ *Meuley v. Zeigler*, 23 Tex. 88; *Astor v. Wells*, 4 Wheat. 466. The solicitor must be one employed "for the confidential purpose of advising," or there is no duty on his part to communicate the knowledge to his client, and the rule of implied notice to the principal does not apply. *Wyllie v. Pollen*, 3 DeG. J. & S. 596; s. c. 32 L. J. (N. S.), Ch. 782.

course of that business and employment.¹ The agent, it is said, cannot stand in the place of the principal until the relation is constituted, and as to all information previously acquired by him, the principal is a stranger.² Again, the agent may have forgotten the prior information, and the principal should not, in the employment of an agent, be subjected to the danger of loss because the agent's memory may not retain a knowledge of prior matters with which the principal then had no concern.³ The rule, however, is not absolute, and does not apply where the information has been so recently received and is of such a character as that it cannot reasonably be presumed to have been absent from the agent's mind while engaged in the later transaction.⁴ A court of equity will not go so far as to say that if an agent has notice of a transaction in the morning he shall be

¹ *Kauffman v. Robey*, 60 Tex. 308; *Barbour v. Wiehle*, 116 Pa. St. 308; s. c. 9 Atl. Repr. 520; 8 Cent. Repr. 415; *N. Y. Central Ins. Co. v. Nat. Ins. Co.*, 20 Barb. 468; *Warrick v. Warrick*, 3 Atk. 291; *Finch v. Shaw*, 19 Beav. 500; *Houseman v. Girard*, 81 Pa. St. 256, 262; *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772; *Russell v. Swezey*, 22 Mich. 235; *McCormick v. Wheeler*, 36 Ill. 114; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Smith v. Denton*, 42 Iowa, 48; *Allen v. Poole*, 54 Miss. 323; *Roach v. Karr*, 18 Kan. 529; *Satterfield v. Malone*, 35 Fed. Repr. 445; s. c. 1 Law Repr. Annotated, 35; *Blumenthal v. Brainerd*, 38 Vt. 402; *Hayward v. Nat. Ins. Co.*, 52 Mo. 181; *Day v. Walmsey*, 33 Ind. 145.

² *Fuller v. Bennett*, 2 Hare, 394; *Mountford v. Scott*, 3 Madd. 40. If this principle controlled absolutely, information before the relation is constituted could in no case charge notice. But it does not so control. *Myers v. Ross*, 3 Head, 60. "The English courts have recently manifested a disposition to depart from the rule (that the knowledge must have been acquired by the agent while acting for the principal); but we deem it a principle just in itself, and founded on wise considerations of public policy." *Lawrence, J.*, in *McCormick v. Wheeler*, 36 Ill. 114.

³ *Spielman v. Kleist*, 36 N. J. Eq. (9 Stew.), 199; *Fuller v. Bennett*, 2 Hare, 394; *Bracken v. Miller*, 4 Watts & S. 102; *Warrick v. Warrick*, 3 Atk. 291.

⁴ *Fuller v. Bennett*, *supra*; *Constant v. Am. Society*, 53 N. Y. Sup. Ct. 170; *Holden v. N. Y. Bank*, 72 N. Y. 286. *The Distilled Spirits*, 11 Wall. 356; *Dunlap v. Wilson*, 32 Ill. 517; *Patten v. Ins. Co.*, 40 N. H. 375; *Pritchett v. Sessions*, 10 Rich. Law, 293; *Abel v. Howe*, 43 Vt. 403; *Wiley v. Knight*, 27 Ala. 336; *Wilson v. Minn. Fire Ass'n*, 36 Minn. 112; s. c. 30 N. W. Repr. 401.

presumed to have forgotten it in the evening.¹ But where a solicitor or attorney acquires information of a fact in the discharge of his duties under circumstances that would render it a breach of professional confidence for him to communicate the fact to a subsequent client, or take advantage of such information to promote the interests of the later client, he will not be presumed to have done so, and notice will not be imputed to the principal in such case.²

§242. Agent Acting for Both Parties, and for His Own Benefit.

The fact that the agent acts in the negotiation for both parties, vendor and purchaser, does not necessarily afford a reason why the purchaser should not, by his agent's knowledge, be charged with notice of the equities of third parties affecting the property.³ But in such cases the rule is less strictly applied, and it has been held that where the mortgagee did not know that the agent was acting also for the mortgagor, he was not chargeable with notice by reason of the agent's knowledge of a prior incumbrance on the property.⁴ An agent is such fully and properly, he is *alter ego*,

¹ Mountford v. Scott, Turn. & R. 274. Drawing a deed of the premises four years before does not charge notice. White v. Fisher, 77 Ind. 65; s. c. 40 Am. Rep. 287.

² Hood v. Fahnestock, 8 Watts, 489; McCormick v. Wheeler, 36 Ill. 115; Templeman v. Hamilton, 37 La. Ann. 754.

³ Astor v. Wells, 4 Wheat. 466; Boyd v. Yerkes, 25 Ill. App. 527; Le-Neve v. Le Neve, Amb. 436; s. c. 1 Ves. 64; 3 Atk. 646; Losey v. Simpson, 11 N. J. Eq. 246; Holden v. N. Y. & Erie Bk., 72 N. Y. 286; Tweedale v. Tweedale, 23 Beav. 341.

The mere fact that only one attorney is employed in the negotiation or business, does not make him the attorney of both parties. Astor v. Wells, *supra*; Espin v. Pemberton, 3 DeG. & J. 547, 554; Perry v. Holl, 2 De G. F. & J. 38, 53; even though the other party (the mortgagee) asks questions of the attorney about the title, and afterwards entrusts the mortgage to him to be recorded. Astor v. Wells, *supra*.

⁴ Bunton v. Palm (Tex.), 9 S. W. Repr. 182. So, where the attorney is himself the borrower the rule does not apply, and a second mortgagee will not be charged with notice of a prior mortgage of the property executed by the attorney. Hope Fire Ins. Co. v. Cambrelling, 1 Hun. 493. See Rolland v. Hart, L. R. 6 Ch. App. 678, 683; Winchester v. B. & S. Ry. Co., 4 Md. 231.

only in cases where his interest in the business is in no sense whatever antagonistic to that of the principal; his compensation, for instance, not being dependent, in the form of commissions, on the success or failure of the negotiation.¹ Where his labor is to be lost unless a purchase, loan or trade be made by or for his principal, his interest and that of the principal are not entirely identical; and very often, if not usually, in such cases, the agent has no authority to bind the principal in any manner. Where the agent inaugurates the negotiation for his own benefit, and acts in this capacity, in behalf of one or both the parties; where he is "the contriver, the actor and the gainer of the transaction"—the reason for charging the principal with notice because of his knowledge does not exist. Thus, where A. desiring to obtain a sum of money from B. offered in consideration therefor to procure for him a conveyance of certain real estate from a third party, which offer was accepted, it was held that A.'s knowledge of a prior incumbrance on the property did not affect B. with notice.²

¹ *Kennedy v. Green*, 3 My. & K. 699. Where one acts as agent for another without authority, such other person, in ratifying the unauthorized act, and accepting the benefit of it, must take the benefit charged with the liability of notice to the agent at the time of the transaction: as where the grantor in a prior unrecorded conveyance acted as the agent of one of his creditors in directing the levy of an attachment upon the same property, the creditor, by claiming rights under the levy was held chargeable with notice. *Hovey v. Blanchard*, 13 N. H. 145; and see also, *Jennings v. Moore*, 2 Vern. 609; *Wade on Notice*, §691.

² *Peppard v. House*, 37 Minn. 280; s. c. 33 N. W. Repr. 790. It is to the interest of the vendor or mortgagor that a prior incumbrance should be concealed, and to the interest of the other party that it should be known; hence it is contrary to law and public policy that the same person should be agent for both parties—especially upon a contingent compensation. *Bunton v. Palm* (Tex.), 9 S. W. Repr. 182; *Story on Agency*, §§210-212.

If one with notice that his agent assumes to have and to exercise a power he really does not possess, as agent, permits the agent to hold himself out as clothed with such power, then the principal will be as fully bound by the acts of the agent as though the latter possessed the power, in so far as third persons are concerned. *Collins v. Cooper*, 65 Tex. 460. As to ratification by corporations, see *Scott v. Middleton, etc., Ry.*, 86 N. Y. 200; *Gilman, etc., Ry. v. Kelley*, 77 Ill. 426; *Tracy v. Guthrie Co., etc.*, 47 Iowa, 27.

§243. Where Agent is Guilty of Fraud.

The law in imputing notice to the principal proceeds largely on the theory that the agent has discharged his duty in communicating to his principal all information within his knowledge materially affecting the property or business. Where, however, in the course of the business the agent contrives an independent fraud for his own benefit, the successful perpetration of which would require a concealment from his principal of the facts to which the notice relates, the presumption that he has communicated such facts does not obtain, and the principal is not held chargeable with notice.¹ It is not every fraud of the agent, however, though done in the transaction involving the agency, or in the course of that business, that comes within the exception.² The fraud must be such as renders concealment necessary, or operates to the principal's injury; it is not sufficient that the agent merely conceals from the principal a knowledge of material facts.³

¹ Kennedy v. Green, 3 My. & K. 699; Cave v. Cave, L. R., 15 Ch. D. 639; Barnes v. Trenton Gas Co., 27 N. J. Eq. 33; Winchester v. B. & S. Ry. Co., 4 Md. 231; Fulton Bk. v. N. Y., etc., Co., 4 Paige, 127; Hewitt v. Loosemore, 9 Hare, 449; McCormick v. Wheeler, 36 Ill. 114; Rolland v. Hart, L. R., 6 Ch. 678.

² The question is sometimes affected by very delicate shades of difference, and quite a number of the cases confessedly rest upon very narrow distinctions. See Boursot v. Savage, L. R., 2 Eq. 134, 142; Atterbury v. Wallis, DeG. M. & G. 454, 466; Davis v. Bk. of U. S., 2 Hill, 451; Bk. of New Milford v. Town of New Milford, 36 Conn. 93; Tagg v. Tenn. Nat. Bk., 9 Heisk. 479; Rolland v. Hart, L. R., 6 Ch. 678, 682, and 2 Pom. Eq. Jur., §675 and notes, to which I am indebted for much of the matter of this section.

³ The subject is ably discussed in the opinion by Folger, J., in Holden v. N. Y. & Erie Bank, 72 N. Y. 286, where the president and chief managing officer of the bank was also trustee for certain minors, under a will, and had deposited the trust funds in the bank to his credit as trustee. The bank was entirely insolvent, a fact well known to its president, though not to the public; and the president himself was heavily indebted to the bank, having largely overdrawn his individual account. His fraudulent conversion of the trust funds by transferring them to the bank in part payment of his own account, while a fraud on the beneficiaries under the trust, was an act that enured to the benefit of the bank; and it was held that the bank, through the knowledge of its agent and president, had notice of the character of the funds and the violation of

§244. Notice to Officers and Agents of Corporations.

Corporations frequently transact their business through quite a number of officers, employés and agents of different grades, and regularly entrusted with different duties; and hence the rule that notice to the agent is notice to the principal often meets with much difficulty in its proper application to corporations. The duties of the particular officer or agent must have some direct connection with the matter in reference to which notice is sought to be charged against the corporation. The knowledge, for instance, of an inferior agent, located in one state, cannot affect the corporation with notice in relation to a matter of business transacted through its other agents in a different state.¹ It is declared in a number of the cases that notice to a director or other officer of a corporation will not be notice to the corporation unless such officer was at the time of receiving the notice or information acting in behalf of the corporation, and actually engaged in transacting its business; the fact that he was at that time clothed with official authority not being sufficient.² While, for reasons indicated, it is more difficult

the trust. But where the interest of the officer is, in the particular transaction, opposed to that of the corporation, as where he sells to it, the rule is different. *La Farge Ins. Co. v. Bell*, 22 Barb. 54; *Frenkel v. Hudson*, 82 Ala. 158; s. c. 2 South Repr. 758; *Int. Wrecking Co. v. McMorran* (Mich.), 41 N. W. Repr. 510; *Peckham v. Hendren*, 76 Ind. 47; *Wickersham v. Chicago, etc.*, 18 Kan. 481; s. c. 26 Am. Rep. 784.

¹ *Congar v. C. & N. W. Ry. Co.*, 24 Wis. 157; *Mich. Cent. Ry. v. Dolan*, 32 Mich. 510. The mere fact that a bank director has such knowledge as would prevent his becoming an innocent holder of a certain note, would not affect the bank if the paper should be received there and discounted without his knowledge, as it could hardly be his duty to report to the bank every fact coming to his notice in regard to all the negotiable paper of which he might have any knowledge, where he had received no intimation that such paper would be presented there for discount. *Wade on Notice*, §683, citing *Louisiana State Bk. v. Senecal*, 13 La. 525; *Gen. Ins. Co. v. U. S. Ins. Co.*, 10 Md. 517; s. c. 49 Am. Dec. 174; *Farmer's Bk. v. Payne*, 25 Conn. 444; *Nat. Bk. v. Norton*, 1 Hill, 572; *Washington Bk. v. Lewis*, 22 Pick. 24; and see *Wilson v. Second Nat. Bk. (Pa.)*, 7 Atl. Repr. 145.

² *Johnson v. Shortridge*, 93 Mo. 227; s. c. 12 West. Repr. 106; 6 S. W. Repr. 54; *First Nat. Bk. v. Christopher*, 40 N. J. 435; *N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. 468; *C. & S. Ry. v. L. S. & M. Ry.*,

to apply the general rules of notice to corporations, it does not follow that these cases involve any substantial difference of principle. If the notice or information received is of such a character that it is the duty of the particular officer, member or agent to communicate it to the managing board, body or official, and at the time this duty becomes incumbent the information has been so recently received that it must reasonably be still remembered, it is immaterial how, or in what capacity, or under what circumstances the knowledge was acquired or notice received.¹ Notice, however, to an individual corporator, if he be not constituted by the charter or by-laws an organ of communication between the corporation and those who deal with it, is not notice to the corporation, because the mere presumption that he had imparted the information to the body would be rebutted by the fact that it was not his duty to do so.²

5 Fed. Repr. 19; *Houseman v. Mut. Build. Ass'n*, 81 Pa. St. 256; *North River Bk. v. Aymar*, 3 Hill, 262; *Haywood v. Nat. Ins. Co.*, 52 Mo. 181; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; s. c. 59 Am. Dec. 478; *Atlantic State Bk. v. Savery*, 82 N. Y. 291, 307; *Burt v. Batavia Paper Co.*, 86 Ill. 66; *Armstrong v. Abbott*, 11 Colo. 220. The mere fact that two corporations have the same attorney, or the same directors, does not render each chargeable with notice of whatever is known or done by the other. *Fulton Bk. v. N. Y. Canal Co.*, 4 Paige, 127; *Banco de Lima v. Anglo-Peruvian Bk.*, L. R., 8 Ch. D. 160, 175.

¹ *Fairfield Bk. v. Chase*, 72 Me. 226; *Hart v. Farmer's Bk.*, 33 Vt. 252; *Wade on Notice*, §§687, 688, and see cases above, and *Seneca Co. Bk. v. Neass*, 5 Denio, 329; *Atlantic Bk. v. Savery*, 82 N. Y. 291; *Farmer's Bk. v. Payne*, 25 Conn. 444; *G. W. Ry. v. Wheeler*, 20 Mich. 419; *Wilson v. Minn. Fire Ass'n*, 36 Minn. 112; s. c. 30 N. W. Repr. 401; *Fulton Bk. v. N. Y., etc., Canal Co.*, 4 Paige, 127; *Waynesville Nat. Bk. v. Irons*, 8 Fed. Repr. 1; *Nat. Security Bk. v. Cushman*, 121 Mass. 490.

² *Housatonic Bk. v. Martin*, 1 Met. (44 Mass.), 294; *Fairfield Bk. v. Chase*, 72 Me. 226. "There is no legal identity between individuals and a corporation which will prevent it from becoming a purchaser in good faith from one of its members. There is great reason for not confounding the corporation partly made up of such members, with an officer who in his private capacity commits a fraud upon it, and sells its property with no notice of infirmity of title." *Campbell, J.*, in *International Wrecking Co. v. McMorran* (Mich.), 41 N. W. Repr. 510; and see, also, *Barnes v. Trenton, etc., Co.*, 27 N. J. Eq. 33.

"Notice to an agent 24 hours before the relation commenced is no more notice than 24 hours after it ceased would be." *Houseman v.*

Building Ass'n, 81 Pa. St. 256; *contra*, *Fairfield Bk. v. Chase*, 72 Me. 226, and cases in last note above.

"I think if I were to say that where a gentleman has been manager of one company for three years after a transaction had taken place, and had then ceased to be so for two years and had become the agent of another company, the other company to which he became the agent is bound by all the knowledge that he once possessed, and that he as their agent was bound to recollect all the minute arrangements of the documents which he is not in possession of, and which are not accessible to him, and also to go into the general account between principal and agent arising out of this transaction, it would, in my opinion, be carrying the doctrine of notice to a most inconvenient and dangerous extent." *Malins, V.-C.*, in *Banco de Lima v. Anglo-Peruvian Bk.*, 8 Ch. Div. 25 Eng. R. (Moak's notes), 175.

The knowledge of an arbitrary mark of a consignor of goods by railroad, possessed by a former officer or agent of the railroad company—such knowledge not having been acquired by any usage, custom or course of business of the company—is not the knowledge of the company. *The Great Western Ry., etc.*, v. *Wheeler*, 20 Mich. 419.

Some cases of notice of various kinds to corporations through different officers are here given. Thus, notice to the president is good, if relating to a matter under his care. *Smith v. Board of Water Com'rs*, 38 Conn. 208; and to a treasurer who is the managing agent. *Newburg Car Co. v. Union, etc., Co.*, 4 Blatchf. 1; and the superintendent of a mine. *Quincy Coal Co. v. Hood*, 77 Ill. 68; to the head switchman of a railroad. *Reed v. Burlington, etc., Ry.*, 72 Iowa. 166; s. c. 33 N. W. Repr. 451; to a section master. *B. & O. Ry. v. McKenzie*, 81 Va. 71; to the cashier of a bank. *Witters v. Sowles*, 32 Fed. Repr. 758; and see *Sangamon Coal Co. v. Wiggerhaus*, 122 Ill. 279; s. c. 13 N. E. Repr. 648; 11 West. Repr. 578; *Johnson v. Shortridge*, 93 Mo. 227; s. c. 6 S. W. Repr. 64; 12 West. Repr. 106; *First Nat. Bk. v. Loyhed*, 28 Minn. 396; s. c. 10 N. W. Repr. 421; *Baldwin v. St. Louis, etc., Ry. (Iowa)*, 39 N. W. Repr. 507; *Huff v. Farwell*, 67 Iowa, 298; s. c. 25 N. W. Repr. 252; *Nisbit v. Macon Bk.*, 4 Woods, 464; s. c. 12 Fed. Repr. 686; *Farwell v. Houghton Works*, 8 Fed. Repr. 66; *Mechanic's Bk. v. Seton*, 1 Pet. 299.

A director of a land company, who was also probate judge, at the grantor's request draughted a deed in the presence of the president and another member of the executive board of the company, conveying to a third person certain lots, and took the acknowledgment of the deed; the company at the same time conveying to the same grantee—a church—other adjoining lots. Two months afterwards, the first deed not being recorded, the company purchased one of the lots from the same grantor. *Held*, that the company was not chargeable with actual notice. citing *The Distilled Spirits*, 11 Wall. 356. "The principal is not bound by unofficial knowledge communicated to the agent, unless such knowledge is present to the agent's mind at the time of effecting the later purchase." *Armstrong v. Abbott*, 11 Colo. 220.

Where an officer of a corporation deals with himself as an individual, or agent of a firm, if he is faithful to the corporation, and acts to its interest, then the corporation is chargeable with notice by reason of facts known to him; but if he acts for his own interests, and drives a bargain for his interest alone, the corporation is not chargeable. *Seixas v. Citizen's Bank*, 38 La. Ann. 424, citing *Bank v. Darien*, 1 Stew. (Ala.) 280, 295; *Peckham v. Hendren*, 76 Ind. 47; *Barnes v. Trenton*, 27 N. J. Eq. 33; *Winchester v. Ry. Co.*, 4 Md. 231.

³ Since this chapter has been in press, the decision of the supreme court of Missouri in the case of *Drey v. Doyle* (12 S. W. Repr. 287), has been rendered, and in the well considered opinion by Mr. Justice Black the distinctions of actual, of constructive, and of presumptive notice are stated in substantial accord with the text of this work, *ante*, §§219-222; the opinion citing 2 Pom. Eq. Jur. §593; Bisp. Eq. (3d ed.) §268; *Speck v. Riggin*, 40 Mo. 405; *Rhodes v. Outcalt*, 48 Mo. 367; *Whitmore v. Taylor*, 60 Mo. 127; *Shumate v. Reavis*, 49 Mo. 333.

The requirement of "actual notice" by the Missouri statute (Rev. Stats. 1879, §693; Rev. Stats. 1889, §2420; *post*, §390) is considered, especially with reference to possession as charging notice, and it is held that possession will not, *per se*, constructively charge notice; but that where the possession is known to the subsequent purchaser, it is a fact ordinarily sufficient to impose the duty of inquiry, and thus to charge notice of whatever that inquiry, fairly and reasonably prosecuted, would have disclosed; citing *Vaughan v. Tracy*, 22 Mo. 420; (s. c. 69 Am. Dec. 421; 25 Mo. 318;) *Maupin v. Emmons*, 47 Mo. 304.

"The question (of actual notice) is one of fact, and is to be determined like any other fact. * * * * Possession and knowledge thereof will, in ordinary cases, be good proof (to go to the jury) of notice of the title under which the party in possession claims. Such evidence, under other circumstances, will be of little value. * * * Any evidence tending to show knowledge of the prior unrecorded instrument should be received as evidence of notice." The rule thus declared by Justice Black is the one that obtains in those states, as Wisconsin, Massachusetts, Maine, and others, whose statutes provide that the subsequent purchaser shall be without "actual notice," instead of without "notice." *Ante*, §§229, 222.

The case further decides that the subsequent purchaser need not, aside from the recitals in the deed to him, prove himself a purchaser for value where such deed recites that the grantee therein assumes the payment, as part of the purchase price, of a stated incumbrance on the property, as such assumption constitutes a valuable consideration; citing *Jackson v. Winslow*, 9 Cow. 13; 2 Pom. Eq. Jur. §747.

CHAPTER 10.

PERSONAL PROPERTY.

- §245. General principles.
- 246. Statutory and other distinctions.
- 247. Possession as notice.
- 248. Continued—Purchaser protected, when.
- 249. Conditional sales—General rule.
- 250. Continued—Purchaser protected.
- 251. Statutes requiring registry of conditional sales.
- 252. Chattel mortgages—Fixtures—Chattels real.
- 253. Description of property.
- 254. Filing and recording.
- 255. Continued—Statutory time—Bill of sale.
- 256. Filing and withdrawal.
- 257. Re-filing.
- 258. Continued—Time within which to be done.
- 259. Re-filing excused by possession.
- 260. Affidavit of renewal.
- 261. Place of record—Residence of mortgagor.
- 262. Continued—Non-residents.
- 263. Residence of corporation.
- 264. Residence of partnership.
- 265. Removal of property.
- 266. Removal to another state.
- 267. Comity of states—Record notice.
- 268. Continued—*Lex situs* controls, when.
- 269. Actual notice.
- 270. Notice to creditors.
- 271. Affidavit of good faith.
- 272. Recorder's certificate.
- 273. Mortgages of growing crops.
- 274. Continued—When record not constructive notice.
- 275. Conveyances and mortgages of vessels.
- 276. Continued—Federal and state statutes.

§245. General Principles Apply as to Real Estate.

The operation of the registry laws having proven beneficial, the tendency of legislation is to include personal property within their provisions, and the statutes in this

respect are undergoing constant change and extension, especially with reference to chattel mortgages, conditional sales and the like. There is in principle no difference in the doctrine of notice by registry, whether applied to real or personal property. Thus, the rule that a *bona fide* purchaser from a fraudulent vendee, or grantor with notice, will be protected, applies to personal as well as real property;¹ as also the rule that circumstances sufficient to put on inquiry will charge notice.² As already noticed, however, there is some difference in the rule of construction, as between real and personal property, in determining what instruments, relating to the one or the other kind, are required to be recorded.³ The general rule obtains that the law contemplates the registry of all instruments affecting the title to realty, but such a rule would not be applied as to personal property. Thus, while it is admitted by the Virginia court that the word "chattels" is one of very large signification, and generally includes choses in action as well as all species of personal property, yet it is held that as found in the registry statute of that state, it is used in a

¹ Fawcett v. Osborn, 32 Ill. 411; s. c. 83 Am. Dec. 278; Moody v. Blake, 117 Mass. 23; s. c. 19 Am. Rep. 394; Le Grand v. Eufala Bank, 81 Ala. 123; s. c. 60 Am. Rep. 140; Saltus v. Everett, 20 Wend. 267; s. c. 32 Am. Dec. 541; Maury v. Walsh, 8 Cow. 243; Jennings v. Gage, 13 Ill. 610; s. c. 56 Am. Dec. 476; Rowley v. Bigelow, 12 Pick. 307.

So, a purchaser with notice, from a *bona fide* purchaser, is protected. Barber v. Richardson, 57 Vt. 408; and see also, Sadler v. Lewes, 42 Ark. 148; Curme v. Rauh, 100 Ind. 247. The purchaser must have parted with a valuable consideration in good faith. Funk v. Paul, 64 Wis. 35; s. c. 24 N. W. Repr. 419; Rateau v. Bernard, 3 Blatchf. 244; Barnard v. Campbell, 58 N. Y. 73; s. c. 17 Am. Rep. 208; Tiffany v. Warren, 37 Barb. 571.

² Higgings v. Lodge, 68 Md. 229; s. c. 6 Am. St. Rep. 437; Bradlee v. Whitney, 108 Pa. St. 362; Robinson v. Levi, 81 Ala. 134; Reed v. Gannon, 50 N. Y. 345; Parker v. Conner, 93 N. Y. 118; s. c. 45 Am. Rep. 178.

³ *Ante*, §40. The object of the registry statutes as to chattel mortgages is the same as in case of real estate, and the same general principles are alike applicable in each case. Appleton, C. J., in Griffith v. Douglass, 73 Me. 532; s. c. 40 Am. Rep. 359. The object is to prevent fraud; hence, possession must be taken, or notice given by registry or otherwise. Horner v. Stout, 5 Colo. 166.

more restricted sense, and that a provision that conveyances of "goods and chattels" shall be recorded, does not embrace assignments of choses in action.¹ A number of the statutes, while authorizing or permitting the record of all conveyances of personal property, do not attach to a failure to record in such cases the penalty or consequences that pertain to such failure with relation to instruments affecting real estate, and where this is the case the record of conveyances of personalty is not in all instances held obligatory.²

§246. Statutory and Other Distinctions.

There are, of course, many statutory differences in the law of registry as affecting personal property, just as there are in the law applicable to real estate. This will more fully appear by reference to the succeeding chapter devoted to the statutory laws, and it is designed to call attention here to only such of these differences as more especially arise from the different nature and character of real and personal property. The smaller value of personal property has induced in a majority of the states quite a difference in the statutory requirements as to the form, manner and details of its record; the leading purpose being evidently to simplify the method and cheapen the cost of recording conveyances of personalty. Nearly all the statutes provide that the filing and indexing of a chattel mortgage shall be a sufficient record thereof, without its being transcribed in a book of record.³ So, in a number of states, acknowledgment is dispensed with, although acknowledgment or proof for record is in the same states still required as to conveyances of realty.⁴ In Illinois and Missouri the acknowledg-

¹ *Kirkland v. Brune*, 31 Gratt. 136; *Code of Va.* 1887, §2465; *Gordon v. Rixley*, 76 Va. 694, 701; *Dailey v. Warren*, 80 Va. 512.

² *Chandler v. Burnham*, 15 Tex. 441; *Pegram v. Owens*, 64 Tex. 475. See *ante*. §40; *Parker v. Hall*, 2 Head, 641.

³ *Sayles' Rev. Stats. of Tex.*, §31906; *Chaytor v. Brunswick*, 71 Tex. 591; s. c. 10 S. W. Repr. 250; *Loeb v. Hirsch*, 21 Neb. 392; *Ward v. Watson*, 24 Neb. 592.

⁴ *Bickley v. Keenan*, 60 Ala. 293; *Hicks v. Ross*, 71 Tex. 358; *Hunt v. Bowen*, 75 Ga. 662; *Chaytor v. Brunswick*, 71 Tex. 591; s. c. 10 S. W.

ment of a chattel mortgage before a justice of the peace must be before one in the county in which the mortgagor, if a citizen of the state, resides at the time;¹ and in the former state an entry of the acknowledgment in the docket of the justice is essential to its validity as against third persons.² The most material differences, however, in the law of record of the two kinds of property, grow out of the transitory character of personal property. Having no fixed *situs*, the place for recording title to it is variously determined by the place of residence of the grantor, of the grantee, and the place of the property at the time.³ The transfer of record, in case of removal of the property, is a feature not found at all in the law of real estate;⁴ and the annual re-filing of chattel mortgages, where required, is principally due to the transitory nature of the property.⁵

Repr. 250. See *Hooker v. Hammill*, 7 Neb. 231; *Crane v. Chandler*, 3 Colo. 21.

¹ *McDaniel v. Harris*, 27 Mo. App. 545; *Ticknor v. McClelland*, 84 Ill. 471; *McDowell v. Stewart*, 83 Ill. 538. And the law is substantially the same in Colorado, where, under the terms of the statute, acknowledgment is essential to the validity of a chattel mortgage as against third persons acting in good faith; *Crane v. Chandler*, 3 Colo. 21; though not necessary to the record of a deed; *Holladay v. Daily*, 1 Colo. 460. The acknowledgment must be before a justice of the peace of the town or election district in which the mortgagor resides. *Henderson v. Morgan*, 26 Ill. 431; *Stephenson v. Browning*, 48 Ill. 78; *Durfee v. Grinnell*, 69 Ill. 371. A police magistrate is a justice authorized to take the acknowledgment. *Herkelrath v. Stookey*, 58 Ill. 21; *Ticknor v. McClelland*, *supra*. One of several joint owners or partners may acknowledge in the justice's district where such owner resides, and where the property is situated, and it will be sufficient. *Funk v. Staats*, 24 Ill. 632.

² *Koplin v. Anderson*, 88 Ill. 120; *Pike v. Colvin*, 67 Ill. 227; *Harvey v. Dunn*, 89 Ill. 585. See as to difference in certifying the identity of the grantor, between the acknowledgment of a deed and of a chattel mortgage, *Gage v. Wheeler* (Ill.), 21 N. E. Repr. 1075.

³ *Weaver v. Chumm*, 99 N. C. 431; *Watson v. Thompson*, 49 Ark. 83; s. c. 4 S. W. Repr. 384. See *post*, §§261-264; *First Nat. Bk. v. Damm*, 63 Wis. 249; *Bannon v. Bowler*, 34 Minn. 416; s. c. 26 N. W. Repr. 237.

⁴ See *Hubbard v. Andrews*, 76 Ga. 177; *Peterson v. Kaigler*, 78 Ga. 245; *Kanaga v. Taylor*, 7 O. St. 134; s. c. 70 Am. Dec. 62; *Lafayette v. Metcalf*, 29 Mo. App. 384; *post*, §§265-268; *Cool v. Roche*, 20 Neb. 550; s. c. 31 N. W. Repr. 367.

⁵ See *Wood v. Weimar*, 10 Otto, 786; *In re Leland*, 10 Blatchf. 503;

§247. Possession as Notice, and as Protecting a Subsequent Purchaser.

The rule that actual possession gives notice of title applies with greater force to personal than to real property, for the reason that in the former class of cases the possession is in its nature and character usually more complete and exclusive, and therefore more significant.¹ At common law possession of mortgaged chattels, by the mortgagee, was essential to the lien; and in a number of the states such possession dispenses with the necessity under the recording acts of filing the mortgage.²

The title of personal property, saving exceptional cases and interests, is not made, nor required to be made, a matter of record, and possession is the principal *indicia* of its ownership. Under the operation of the registry laws a *bona fide* purchaser of real estate from one clothed with the apparent legal title, is protected against the real or equitable owner; and by analogy a purchaser of personal property from one invested by lawful possession with the apparent legal title should be protected to the same extent, and his title sustained, unless there was something in the character and circumstances of the possession reasonably

Cooper v. Koppes, 45 O. St. 625; s. c. 15 N. E. Repr. 662; *post*, §§257-260; Jones on Chat. Mort., §§286-298; Stewart v. Cole, 43 Hun. 164.

The registry acts of several states as affecting personal property are substantially the same as those pertaining to real estate, and contain but few features and provisions that relate specially to the former. This is the case in Connecticut, Delaware, Florida, Kentucky, Maryland, Virginia and West Virginia. In Florida, the word "proving" in the statute as to the admission of chattel mortgages to record, includes an acknowledgment for record by the makers. *Einstein's Sons v. Shouse*, 5 South. Repr. 380; citing *Sanders v. Papoon*, 4 Fla. 472; *Knowles v. Masterson*, 3 Humph. 619.

¹ *Crocker v. Crocker*, 31 N. Y. 507; *Gass v. Hampton*, 16 Nev. 189; *Wade on Not.*, §§67, 68. No title can be conveyed to a third person if the possession was acquired by theft or fraud. *Seltan v. Gerdan*, 48 Hun. (55 N. Y. Sup. Ct.), 537.

² *Applewhite v. Harrell*, 49 Ark. 279; s. c. 5 S. W. Repr. 292; *Weber v. Armstrong*, 70 Mo. 217; *Nicholson v. Golden*, 27 Mo. App. 132; *Russell v. Fillmore*, 15 Vt. 130; *Humphries v. Bartee*, 10 Sm. & M. 282; *Morrow v. Reed*, 30 Wis. 81; *Janvrin v. Fogg*, 49 N. H. 340; *Cooper v. Brock*, 41 Mich. 488; *Marsh v. Wade* (Wash. Ter.), 20 Pac. Repr. 578.

calculated to suggest a doubt as to ownership being in his vendor. The decided weight of authority, however, is to the contrary; the general rule being that one in possession of personal property without title or authority to sell cannot confer title on a *bona fide* purchaser,¹ and that the mere possession of another's property affords no sufficient evidence that the one having such possession has power to sell it.² Where, however, in addition to the apparent title by possession the owner has also clothed the possessor with an apparent power of disposition, whereby third persons are induced to deal with him, innocent purchasers will be protected in their title.³ This authority may be implied from circumstances, such as the custom of trade, the usages

¹ Simpson v. Shackelford, 49 Ark. 63; s. c. 4 S. W. Repr. 165; Velsian v. Lewis, 15 Or. 539; s. c. 3 Am. St. Rep. 184; 16 Pac. Repr. 631; Sprights v. Hawley, 39 N. Y. 141; s. c. 100 Am. Dec. 452; Griffith v. Morrison, 58 Tex. 46, 51; Courtis v. Crane, 32 Vt. 232; s. c. 76 Am. Dec. 174; Dunn v. Elser, 2 Tex. Civ. App., §720; Dodd v. Arnold, 28 Tex. 98; Hyde v. Noble, 13 N. H. 494; s. c. 32 Am. Dec. 538; Newmark on Sales, §§19, 193, 194; Benjamin on Sales, 4th ed., §320 and notes; Silver Bow, etc., Co. v. Lowry, 6 Mont. 288; s. c. 12 Pac. Repr. 652; Marvin Safe Co. v. Norton, 48 N. J. L. 410; s. c. 7 Atl. Repr. 418; Redewill v. Gillen (N. Mex.), 12 Pac. Repr. 872; Herryford v. Davis, 102 U. S. 235; Cole v. Mann, 62 N. Y. 1; Bean v. Edge, 84 N. Y. 510; Case v. Jennings, 17 Tex. 662; Mayes v. Bruton, 1 Tex. Civ. App. §699; 2 Kent's Com. 324; Dame v. Baldwin, 8 Mass. 521; Glaze v. Blake, 56 Ala. 379; Waters v. Cox, 2 Bradw. 129.

² Dixon v. Caldwell, 15 O. St. 412; s. c. 86 Am. Dec. 487; Wilderman v. Harrington, 2 Tex. Civ. App. §820; Sinkler v. Comparet, 62 Tex. 470; Farley v. Lincoln, 51 N. H. 579; s. c. 12 Am. Rep. 182; Trudo v. Anderson, 10 Mich. 357; s. c. 81 Am. Dec. 795; Cooper v. Newton, 45 N. H. 339; Sprights v. Hawley, *supra*; Marvin v. Norton, 48 N. J. L. 412; s. c. 57 Am. Rep. 566; 7 Atl. Repr. 418; Harkness v. Russell, 118 U. S. 663; s. c. 7 Sup. Ct. Repr. 51; Ketchum v. Brennan, 53 Miss. 596, 607; Zuchman v. Roberts, 109 Mass. 53; s. c. 12 Am. Rep. 598; Sumner v. Wood, 67 Ala. 139; s. c. 42 Am. Rep. 104; Stanley v. Gaylord, 1 Cush. 536; s. c. 48 Am. Dec. 643; Lister v. Allen, 31 Md. 543.

³ Velsian v. Lewis, *supra*; N. Y. Ry. Co. v. Schuyler, 34 N. Y. 30, 69; Cowdrey v. Vanderburg, 101 U. S. 572; Preston v. Witherspoon, 109 Ind. 457; s. c. 58 Am. Rep. 417; 9 N. E. Repr. 585; Farwell v. Importer's Bk., 90 N. Y. 483; Dows v. Kidder, 84 N. Y. 121, 127; Levi v. Booth, 58 Md. 305; s. c. 42 Am. Dec. 332; Rawles v. Deshler, 3 Keyes, 572; Young v. Bradley, 68 Ill. 553.

of business, and from the owner's ratification of prior similar dealings.¹

§248. Continued—Purchaser Entitled to Protection.

That a purchaser in dealing with one in the lawful possession of personal property on the assumption of his being the owner, is not thereby ordinarily guilty of as great negligence or want of judgment as the owner in entrusting the possession of his property to one who will violate the trust by disposing of it, is a proposition that does not need argument; and the rule that he who trusts most should suffer most, may find a proper application in these cases. The general rule which denies protection to a *bona fide* purchaser in these cases is derived from the common law as it originally obtained in England under circumstances essentially different from those that prevail in this country. At common law sales of personal property were principally made in market overt, and the purchaser there, if he acted

¹ Pickering v. Busk, 15 East. 44; Koch v. Branch, 44 Mo. 542; s. c. 100 Am. Dec. 324; Saltus v. Everett, 20 Wend. 267; s. c. 32 Am. Dec. 541; Wright v. Solomon, 19 Cal. 64; s. c. 79 Am. Dec. 196; Quinn v. Davis, 78 Pa. St. 15; Parker v. Baxter, 86 N. Y. 586; Daws v. Kidder, 84 N. Y. 121; Carmichael v. Buck, 10 Rich. 332; s. c. 70 Am. Dec. 236; Levi v. Booth, 58 Md. 305; s. c. 42 Am. Dec. 332, 337.

A conditional sale is invalid as to a subsequent *bona fide* purchaser where the vendor sells to the vendee for the purpose of a re-sale, as where a manufacturer sells to a retail dealer. Winchester, etc., Co. v. Carman, 109 Ind. 31; s. c. 9 N. E. Repr. 707; but a consignment of goods to be sold on commission does not come within the law at all. Peet v. Spencer, 90 Mo. 384; s. c. 3 S. W. Repr. 434.

In Pennsylvania, where the general rule that a *bona fide* purchaser from a conditional vendee acquires no title, does not prevail, a distinction is taken as between such conditional sale and delivery, and delivery under a bailment with an option in the bailee to purchase at a named price; and it is held in the latter instances that the property does not pass as in favor of creditors and purchasers of the bailee. Chamberlain v. Smith, 44 Pa. St. 431; Haak v. Lindermann, 64 Pa. St. 499; Enlow v. Klein, 79 Pa. St. 488; and see also, McCall v. Powell, 64 Ala. 254; Ballard v. Burgett, 40 N. Y. 314; Comer v. Cunningham, 77 N. Y. 398. In Harkness v. Russell, 118 U. S. 663, this distinction is said by Justice Bradley to be not supported by the weight of authority.

in good faith, was usually protected.¹ As the law discountenanced private sales, and offered this means of protection to the purchaser, it was entirely reasonable that the purchaser at a sale not made in market overt should be denied protection. The law of market overt, however, does not obtain in this country,² and the injustice of the general rule which denies protection to a *bona fide* purchaser of personal property from one having the lawful possession of it, has induced both legislation and conflict of decision on the subject.³ The rule now rests principally upon the doc-

¹ 2 Bl. Com. 449. "But property may also, in some cases, be transferred by sale, though the vendor hath none at all in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of the law is that all sales and contracts of anything vendible, in affairs, or markets overt (that is, open), shall not only be good between the parties, but also be binding on all those that have any right or property therein; and for this purpose, the Mirror informs us, were tolls established in markets, viz: to testify the making of contracts; for every private contract was discountenanced by law, insomuch that our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses." *Id.* For English statutes now of force, by virtue of which *bona fide* purchasers from one in possession are protected in a large class of cases, see Benjamin on Sales, 4th Am. ed., §19.

² *Spraghts v. Hawley*, 30 N. Y. 441; *Newkirk v. Dalton*, 27 Ill. 413; *Sandford v. Wilson*, 2 Tex. Civ. App., §248; *Levi v. Booth*, 58 Md. 305; s. c. 42 Am. Dec. 332; *Ventress v. Smith*, 10 Pet. 175; *Browning v. Magill*, 2 Har. & J. 308; *Mowrey v. Walsh*, 8 Cow. 238; *Dane v. Baldwin*, 8 Mass. 518.

³ In a number of states in which the general rule prevails, the courts have not been able at all times to consistently maintain it, and deny to the *bona fide* purchaser the protection to which he is entitled. See *Knittel v. Cushing*, 57 Tex. 354; s. c. 44 Am. Rep. 598, in which protection was accorded because the contract was construed to come within the general policy of the registration law; followed in *Tufts v. Blanton*, 2 Tex. Civ. App., §294; also, *Dudley v. Abner*, 52 Ala. 572, where protection was accorded generally, and because the contract was in the nature of a parol chattel mortgage. The conflict of decision has been very marked in New York. See *Ballard v. Burgett*, 40 N. Y. 314, with elaborate dissenting opinions; *Smith v. Lynes*, 5 N. Y. 41; *Puffer v. Reeves*, 35 Hun. 480, *Brady, J.*, dissenting; *Dows v. Kidder*, 84 N. Y. 121, 127; *Walker v. Mitchell*, 25 Hun. 527, with dissenting opinion by *Walker, P. J.* For statutes requiring the record of conditional sales, see *post*, §251.

trine of *stare decisis*, and the courts in affirming it not unfrequently take occasion to suggest legislative reform.¹ In the matter of conditional sales, involving this principle that lawful possession of personal property should be held, so far as innocent third parties are concerned, to confer the power of disposition, the general rule is denied in several states, and the title of a *bona fide* subsequent purchaser is sustained.²

§249. Conditional Sales—General Rule.

Where there is no statutory provision on the subject, the weight of authority is to the effect that one who purchases chattels in good faith from a vendee under a conditional sale does not acquire the title as against the original vendor, if the latter has not in some way been guilty of negligence in asserting his claim, and there was an express stipulation that the title should not pass from such original vendor until the purchase price was paid.³ In such cases, it is

¹ *Rogers' Locomotive Works v. Lewis*, 4 Dill. 158. "If the question were an open one, this court would be disposed to hold in accordance with the doctrine announced in *Tufts v. Blanton*, *supra*, and *Kuittel v. Cushing*, 57 Tex. 354 (s. c. 44 Am. Rep. 598), because, in our opinion, the law disfavors secret reservations of title to property as being in restraint of trade, and as inviting and conducive to fraud and collusion." *Willson, J.*, in *Dunn v. Elser*, 2 Tex. Civ. App., §720; and to same effect, *Brinker, J.*, in *Redewell v. Gillen* (N. M.), 12 Pac. Repr. 872. If the question were new, it would be more in accordance with the analogies of the law to regard the writing given in the sale as a mere security for the debt in the nature of a personal mortgage. *Comstock, J.*, in *Herring v. Happort*, 15 N. Y. 409.

For cases in which the title of a *bona fide* purchaser of personal property from one in lawful possession thereof has been protected as against the legal owner, see *Horsley v. Hairsine* (Iowa), 41 N. W. Repr. 579; *Ezzard v. Frick*, 76 Ga. 512; *Palmer v. Howard*, 72 Cal. 293.

² §250, *post*.

³ *McComb v. McDonald*, 82 Va. 903; *McIntosh v. Beam*, 47 Ark. 353; *Cole v. Berry*, 42 N. J. L. (13 Vroom.), 303; *Call v. Seymour*, 40 O. St. 670; *Sanders v. Keber*, 28 O. St. 630; *Sumner v. Cottey*, 71 Mo. 650; *Hart v. Carpenter*, 24 Conn. 427; *Marvin v. Norton*, 48 N. J. L. 412; s. c. 57 Am. Rep. 566; 7 Atl. Repr. 418; *Ketchum v. Brennan*, 53 Miss. 596, 607; *Sumner v. Woods*, 67 Ala. 139; s. c. 42 Am. Rep. 104; *Fairbanks v. Eureka Co.*, 67 Ala. 109; *Velsian v. Lewis*, 15 Or. 539; s. c. 3 Am. St. Rep. 198; 16 Pac. Repr. 631; *Hodgson v. Warner*, 60 Ind. 214; *Bradshaw v. Warner*, 54 Ind. 58; *Marquette v. Jefferey*, 49 Mich. 283;

said, the conditional vendee acquires no property in the goods. "He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee therefore in such cases having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to denying the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy."¹ Good faith does not aid the subsequent purchaser in these cases, as under this rule the duty is cast on him of ascertaining the true

s. c. 13 N. W. Repr. 592; *Smith v. Lozo*, 42 Mich. 6; 3 N. W. Repr. 227; *Waughler v. Franklin*, 70 Mo. 650; *Copeland v. Bosquet*, 4 Wash. C. Ct. 588; *Lang v. Rickmers*, 70 Tex. 108; s. c. 7 S. W. Repr. 527; *Sinker v. Comparet*, 62 Tex. 470; *Singer Co. v. Graham*, 8 Or. 17; s. c. 34 Am. Rep. 566; *Crocker v. Gillespie*, 44 Me. 491; s. c. 69 Am. Dec. 118; *Dunbar v. Rawles*, 28 Ind. 225; s. c. 92 Am. Dec. 211; *Bailey v. Harris*, 8 Iowa, 331; s. c. 74 Am. Dec. 312; *Hegler v. Eddy*, 53 Cal. 597; *McRae v. Merrifield*, 48 Ark. 100; s. c. 2 S. W. Repr. 780; *Paine v. Hall's Co.*, 64 Miss. 175; s. c. 1 South. Repr. 56; *Redewell v. Gillen* (N. M.), 12 Pac. Repr. 872; *Allen v. Delano*, 55 Me. 113; s. c. 92 Am. Dec. 573; *Cooley v. Gillan*, 54 Conn. 80; *Silver Bow v. Lowrey*, 6 Mont. 288; *Baals v. Stewart*, 109 Ind. 371; s. c. 9 N. E. Repr. 403; *ante*, §247, notes; *Harkness v. Russell*, 118 U. S. 663; s. c. 7 Sup. Ct. Repr. 51, where the subject is exhaustively discussed by Justice Bradley.

¹ Bigelow, J., in *Coggell v. Hartford*, 3 Gray (69 Mass.), 545; and the rule followed in subsequent cases in that state. *Burbank v. Crocker*, 7 Gray, 158; s. c. 66 Am. Dec. 470; *Zuchman v. Roberts*, 109 Mass. 53; s. c. 12 Am. Rep. 663; *Sargent v. Metcalf*, 5 Gray, 306; s. c. 66 Am. Dec. 368; *Hirschorn v. Conway*, 98 Mass. 149; *Chase v. Ingall*, 122 Mass. 381; *Benner v. Puffer*, 114 Mass. 376; *Fairbanks v. Phelps*, 22 Pick. 535; *Blanchard v. Cooke*, 144 Mass. 207; s. c. 11 N. E. Repr. 83. And see also, *McGinnis v. Savage*, 29 W. Va. 362; s. c. 1 S. E. Repr. 746; *Stokes v. Balaam*, 73 Cal. 154; s. c. 14 Pac. Repr. 574; *Blanchard v. Cooke*, 144 Mass. 207; s. c. 11 N. E. Repr. 83; *De Saint Germain v. Wind*, 3 Wash. Ter. 189; s. c. 13 Pac. Repr. 753; *Baals v. Stewart*, 109 Ind. 371.

character of the interest owned by the person in possession.¹ It is held also that conditional sales do not come within the general provisions of the recording acts, nor of those requiring the registry of chattel mortgages.²

§250. Continued—Purchaser Protected.

In several states, notably in Illinois, Pennsylvania and Maryland, the courts hold, aside from any specific statute requiring the record of conditional sales, that a *bona fide* purchaser from the conditional vendee of personal property, and who is in possession of it under the contract of sale, is entitled to protection as against the owner. Where the vendor has trusted the vendee by making a conditional sale, and a delivery, has thus clothed the vendee with the *indicia* of ownership, has given him a false credit, and has put it in his power to defraud others, an innocent purchaser of the property for valuable consideration, it is declared, ought to be protected.³ The condition to an otherwise completed sale, reserving title to the vendor, is a fraud on creditors, and the policy of the law which discountenances secret liens renders it utterly worthless against them.⁴ The courts of

¹ Such purchasers hold the same legal condition as do *bona fide* purchasers of stolen goods. Metcalf, J., in *Deshon v. Bigelow*, 8 Gray, 159, 160.

² *Campbell, etc., Co. v. Walker*, 22 Fla. 412; s. c. 1 South. Repr. 59; *Heinbockel v. Zugbaum*, 5 Mont. 344; s. c. 5 Pac. Repr. 897; 51 Am. Rep. 59; *Blackwell v. Walker*, 5 Fed. Repr. 419; *Rogers' Locomotive Works v. Lewis*, 4 Dill. 158.

³ *Van Duzor v. Allen*, 90 Ill. 499, citing *Brundage v. Camp*, 21 Ill. 330; *Murch v. Wright*, 46 Ill. 487; *Michigan Ry. v. Phillips*, 60 Ill. 190; *Lucas v. Campbell*, 88 Ill. 447. See also *Jennings v. Gage*, 13 Ill. 610; *McCormick v. Hadden*, 37 Ill. 370; *Gibbs v. Jones*, 46 Ill. 319; *Waters v. Cox*, 2 Bradw. 129; *Levi v. Booth*, 58 Md. 305; s. c. 42 Am. Dec. 332; *Fosdick v. Schall*, 99 U. S. 235. In *Murch v. Wright*, *supra*, Lawrence, J., said that while a conditional sale is valid as between the parties, it is made with the risk on the part of the vendor of losing his lien in case the property should be levied upon by creditors of the purchaser while in possession of the latter.

⁴ *Thompson, C. J.*, in *Haak v. Lindermann*, 64 Pa. St. 499, citing *Chamberlain v. Smith*, 8 Wright (44 Pa. St.), 431; *Rowe v. Sharp*, 51 Pa. St. 26; *Waldron v. Haupt*, 52 *Id.* 408; and see also, *Martin v. Mathiot*, 14 Serg. & R. 214; *Stadtfield v. Huntsman*, 92 Pa. St. 53; *Brunswick v. Hoover*, 95 *Id.* 508; *Krause v. Commonwealth*, 93 *Id.* 418; *Marvin v. Norton*, 48 N. J. L. 410; s. c. 7 Atl. Repr. 418.

Illinois say that to suffer without notice to the world the real ownership to be in one person, and the ostensible ownership to be in another, gives a false credit to the latter, and in this way works an injury to third persons; and that to accord to the vendor in these conditional sales, accompanied with delivery, the full rights of continued ownership, is in violation of the spirit and intent of the chattel mortgage act.¹ The New York cases may be cited freely and numerously upon either side of the question, but the later cases are to the effect that protection will be denied to a *bona fide* purchaser, unless in connection with the sale and delivery to the conditional vendee, and the nature and purpose of his possession, there is some circumstance that confers upon him the right, or apparent right, of disposition.² In a doubtful case, an instrument will be construed

¹ *Hervey v. R. I. Locomotive Works*, 93 U. S. 664, 671; *Ketchum v. Watson*, 24 Ill. 591; *Thompson v. Yeck*, 21 Ill. 73; *Reed v. Eanes*, 19 Ill. 595; *Powers v. Green*, 14 Ill. 386; *Rhines v. Phelps*, 3 Gilm. 460. A creditor stands in the same position as a purchaser, and will be equally protected. *Van Duzor v. Allen*, 90 Ill. 499.

² For cases in which protection was accorded upon some ground to the subsequent purchaser, see *Smith v. Lynes*, 5 N. Y. 41; *Wart v. Green*, 36 N. Y. 556; s. c. 35 Barb. 585; *Comer v. Cunningham*, 77 N. Y. 391; *Dows v. Kidder*, 84 N. Y. 121, 127; *Freeman v. McKean*, 25 Barb. 474; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Hinterminster v. Lane*, 27 Hun. 497; *Beavers v. Lane*, 6 Duer, 238; *Rawls v. Deshler*, 3 Keyes, 572; *Walker v. Mitchell*, 25 Hun. 527, with dissenting opinion; *Devlin v. O'Neill*, 6 Daly, 305; *Parker v. Baxter*, 86 N. Y. 586; *Farwell v. Importer's Bank*, 90 N. Y. 483; and see, *contra*, *Ballard v. Burgett*, 40 N. Y. 314, with elaborate dissenting opinions; *Cole v. Mann*, 62 N. Y. 1; *Puffer v. Reeves*, 35 Hun. 480; s. c. 15 Abb. N. Cas. 388; *Brady, J.*, dissenting; *Bean v. Edge*, 84 N. Y. 510; *Loving v. Johnson*, 68 Tex. 273; s. c. 4 S. W. Repr. 532.

In Maryland a *bona fide* purchaser without notice of the condition on which his vendor acquired the possession, will be protected against the claim of the original owner as well where the sale and delivery are conditional as where the possession has been obtained by fraud. *Lincoln v. Quinn*, 68 Md. 299; s. c. 6 Am. St. Rep. 446; 11 Atl. Repr. 848; citing *Hall v. Hinks*, 21 Md. 406, and discussing *Harkness v. Russell*, 118 U. S. 663; *Levi v. Booth*, 58 Md. 305; s. c. 42 Am. Dec. 332.

Where the contract of sale is that the goods are to be paid for in cash or notes, and it appears that they were delivered with intent to waive the condition, the title will pass. *Lang v. Rickmers*, 70 Tex. 108; s. c. 7 S. W. Repr. 527; *Solomon v. Hathaway*, 126 Mass. 484; *Railroad v. Phillips*, 60 Ill. 193, and New York cases cited above.

a lien in the nature of a chattel mortgage, rather than a conditional sale.¹

§251. Statutes Requiring Record of Conditional Sales.

In quite a number of states it has been provided by comparatively recent statutes, founded in obvious wisdom, that all conditional sales and reservations of title to chattels as security for the purchase money thereof, and where possession is delivered to the vendee, shall be void as to creditors and *bona fide* purchasers, unless the same be in writing and duly filed or recorded as required of chattel mortgages.² In Maine registry is required only where the amount unpaid is as much as thirty dollars.³ In Vermont, besides the usual

¹ For instruments construed to be liens in the nature of chattel mortgages, and not conditional sales with reservation of the title, see *Key v. Brown*, 67 Tex. 300; s. c. 3 S. W. Repr. 443; *Knittel v. Cushing*, 57 Tex. 354; s. c. 44 Am. Rep. 598; also, *Dean v. Nelson*, 10 Wall. 158; *Fowler v. Stoneum*, 11 Tex. 478, 511; *Almy v. Wilbur*, 2 Woodb. & M. 371; *Folsom v. Fowler*, 15 Ark. 280; *Empire Drill Co. v. Allison*, 94 N. C. 538; *Palmer v. Howard*, 72 Cal. 293; s. c. 13 Pac. Repr. 858; *Weaver v. Lapsley*, 42 Ala. 601; s. c. 94 Am. Dec. 671; *Beck v. Blue*, 42 Ala. 32; s. c. 94 Am. Dec. 630.

For instruments construed to be a conditional sale, and not a chattel mortgage, see *Gerow v. Costello*, 11 Colo. 560; nor a lease, though so termed by the parties, *Murch v. Wright*, 46 Ill. 487; s. c. 95 Am. Dec. 455. For distinction between a conditional sale and a mortgage, see *Weathersby v. Weathersby*, 40 Miss. 462; s. c. 90 Am. Dec. 344; *Slowey v. McMurray*, 72 Am. Dec. 251.

"To the common law rule that a person in possession of goods cannot confer upon another either by sale or pledge any other or better title than he himself has, there is an apparent exception in favor of *bona fide* purchasers or pledgees where the party in possession making the sale or pledge has a title defeasible on account of fraud, or by reason of a condition in the contract of sale under which he holds." *Alvey, J.*, in *Levi v. Booth*, 58 Md. 305; s. c. 42 Am. Dec. 332, citing *Hall v. Hinks*, 21 Md. 406; *Donaldson v. Farwell*, 93 U. S. 631.

² *Rawson v. Richards*, 69 Wis. 643; s. c. 35 N. W. Repr. 40; Rev. Stats. Wis. §2317; Code of Va. (1887), §2462; Rev. Code Iowa, §1922; Gen. Stats. Minn. (1878), ch. 39, §15; Sayles, Rev. Stats. Tex. §3190a; Rev. Stats. Mo. (1879), §2507; *Moline Plow Co. v. Braden*, 71 Iowa, 141; s. c. 32 N. W. Repr. 247; *Tift v. Dunn* (Ga.), 5 S. E. Repr. 256; Code of Ga., §1969; Code of N. C., §1275; *Chemical Co. v. Johnson*, 98 N. C. 123; s. c. 3 S. E. Repr. 727; *Johnson v. Moser*, 72 Iowa, 654; 34 N. W. Repr. 825; *Kingsland v. Culp*, 85 Mo. 548; *Thomas v. Richards*, 69 Wis. 671; *King v. Bates*, 57 N. H. 446.

³ Rev. Stats., ch. 111, §5; *Stone v. Perry*, 60 Me. 48; *Drew v. Smith*, 59 Me. 393; *Rawson v. Tuel*, 47 Me. 506; *Nicols v. Ruggles*, 76 Me.

statute requiring record as against creditors and purchasers, it is also provided that a creditor of the conditional vendee may, by attachment, take his place in relation to the property, and extinguish the right of the vendor to it by making payment of the amount remaining due.¹ The effect of these statutes requiring registry is not to cause the title to pass as between the original vendor and vendee until the condition is complied with.² An exchange of horses, in which one of the parties reserves the right to return the horse delivered to him in the event it should prove diseased, has been held to come within the statute requiring the record of conditional sales.³ These acts are intended to prevent secret and unrecorded contracts of sales from being used to the detriment of unsuspecting creditors and purchasers of the vendee; but a consignment of merchandise by a manufacturer to a merchant to be sold on commission does not come within their scope and meaning.⁴ In Mississippi when prop-

25. The stipulation must also be embodied in the note, locally known as a "Holmes note," that is given for the unpaid price. *Boynton v. Libby*, 62 Me. 253; *Rogers v. Whitehouse*, 71 Me. 222; *Field v. Geller-son*, 80 Me. 270; s. c. 14 Atl. Repr. 70.

¹ Rev. Stats., §§1186, 1992; *Duncan v. Stone*, 45 Vt. 123; *Fales v. Roberts*, 38 Vt. 503; *Phelps v. Hubbard*, 51 Vt. 489; *Towner v. Bliss*, *Id.* 59; *Whitcomb v. Woodworth*, 54 Vt. 544; *Bugbee v. Stevens*, 53 Vt. 389. Actual notice of the lien has the same effect as would the record. *Kelsey v. Kendall*, 48 Vt. 24.

² *Thorpe v. Fowler*, 57 Iowa, 541; s. c. 11 N. W. Repr. 3; *Moseley v. Shattuck*, 43 Iowa, 540.

Where under a contract it was agreed that the vendee should carry a watch for thirty days on trial, after which the sale should be made if the watch proved satisfactory, this was held not to be a conditional sale within the statute, and during the thirty days the watch was not subject to attachment by the vendee's creditors. *Mowbray v. Cady*, 40 Iowa, 604.

³ *Kinney v. Cay* (Minn.), 39 N. W. Repr. 140. Where from the terms of a contract it appears that the intent was to appoint an agent to sell certain goods, although the writing is termed a "conditional sale," it will be interpreted as a contract of agency, and need not be recorded. *Empire Drill Co. v. Allison*, 94 N. C. 548; and see also, *Chemical Co. v. Johnson*, 98 N. C. 123; s. c. 3 S. E. Repr. 723.

⁴ *Coover v. Johnson*, 86 Mo. 533; *Peet v. Spencer*, 90 Mo. 384; s. c. 2 S. W. Repr. 434; and see *Smith v. Clews*, 105 N. Y. 283; s. c. 11 N. E. Repr. 632; *Ludden v. Dusenbury*, 27 S. Car. 464; s. c. 4 S. E. Repr. 60; *Winchester v. Carman*, 109 Ind. 31; s. c. 9 N. E. Repr. 707; *Herring v. Cannon*, 21 S. Car. 212; s. c. 53 Am. Rep. 661.

erty is conditionally sold and delivered to one who is a "trader," within the meaning of the code of that state, such property is liable to execution at the instance of a creditor of the conditional vendee, if the sign displayed by the latter fails to indicate the true ownership of the property.¹

§252. Chattel Mortgages—Fixtures—Chattels, Real.

A mortgage of articles that are afterwards so annexed or affixed to real estate as to ordinarily constitute fixtures must be recorded as a chattel mortgage, and the fact that under this construction the examination of title to realty will necessarily involve an examination of the chattel mortgage record, does not change the rule.² The chattel mortgage registry acts, however, do not embrace chattels real, such as leases for years of real estate, or assignments thereof by way of mortgage.³ Where a mortgage includes both real and personal property, it must usually be recorded twice, with mortgages of realty, and also as a chattel mortgage.⁴ It

¹ *Paine v. Hall's Safe Co.*, 64 Miss. 175; s. c. 1 South. Repr. 56. In Georgia, a failure to record as required by the statute does not give an antecedent creditor a right to subject the property to execution. *Conder v. Holliman*, 71 Ga. 93.

² *Sword v. Low*, 122 Ill. 487; *Tregear v. Etiwanda Co.*, 76 Cal. 537; *Sowden v. Craig*, 26 Iowa, 156, 162; s. c. 96 Am. Dec. 125; *Tyler on Fixt.* 673; *Gale v. Ward*, 14 Mass. 352; *Potts v. N. J. Arms, etc., Co.*, 17 N. J. Eq. 395. A mortgage of "all the goods and merchandise in the store," does not include fixtures. *In re Eldridge*, 2 Biss. 366. See, however. *Ex parte Ames*, 1 Low. 561, 567.

³ *Dean v. Hutchinson*, 40 N. J. Eq. (13 Stew.), 83; *Paine v. Mason*, 7 O. St. 199; *Booth v. Kehoe*, 71 N. Y. 341; *Breese v. Bange*, 2 E. D. Smith, 474; *Harrison v. Burlingame*, 48 Hun. 212.

As to mortgages of rolling stock and other fixtures of railroads made by statute valid without filing or recording as chattel mortgages, see *Kelly v. Boylan*, 32 N. J. Eq. 581; *Williamson v. N. J., etc., Ry. Co.*, 29 N. J. Eq. 311; *Jones on Chat. Mort.*, §281.

A lease reserving a lien on chattels included in it, must be filed as a chattel mortgage. *Merrill v. Ressler*, 37 Minn. 82; s. c. 33 N. W. Repr. 117; 5 Am. St. Rep. 822. Where machinery is placed on land and mortgaged with it, record as a real estate mortgage is sufficient. *Boyle Ice Co. v. Gould*, 73 Cal. 153; 14 Pac. Repr. 609.

⁴ *Deane v. Hutchinson*, 40 N. J. Eq. (13 Stew.), 83; *Stewart v. Beale*, 68 N. Y. 629; s. c. 7 Hun. 405. The statutes of some states provide that

has been held, however, that where the statute required mortgages of personalty to be recorded in a book kept for that purpose, and it appeared to be the usage of the office to record mortgages, embracing both realty and personalty, only in the book for real estate mortgages, such recording was sufficient as to the personal property also.¹

§253. Description of Property.

As in the case of deeds, the record of a chattel mortgage will not be constructive notice, unless the instrument is valid and contains a description of the property sufficiently definite to comply with the rules of law on that point. The courts give a liberal construction to the terms of conveyance in chattel mortgages in order to make them effectual.²

one record shall be sufficient. Indexing and recording a mortgage which contains an assignment of rents, as a land mortgage only, is not notice of the assignment. *Trulock v. Donahoe* (Iowa), 40 N. W. Repr. 696.

¹ "Now if this be insufficient, nothing short of recording such a deed in both books could be held a compliance with the statute. And can this be necessary? * * * To require a double record would seem to be an unreasonable construction of the statute, as it cannot be necessary to effectuate its object. * * * Any inquiry of the clerk for the record of a mortgage like the one under consideration, would as certainly lead to it, under the usage, as if it were recorded in both books." *McLean, J.*, in *Anthony v. Butler*, 13 Pet. 423. This case must be regarded as an unusually liberal construction of a recording statute; and is one of a very few cases that recognize usage as having any controlling effect in such matters. *Fisher v. Tunnard*, 25 La. Ann. 179.

Rolling stock of a railroad is personal property, and a mortgage of it is to be filed as a chattel mortgage. *Stevens v. Buffalo, etc. Ry. Co.*, 31 Barb. 590; overruling *Farm. L. & T. Co. v. Hendrickson*, 25 Barb. 484. A subsequent chattel mortgagee of fixtures cannot raise the question that a prior chattel mortgage of them should have been recorded as a real estate mortgage. *Smith v. Waggoner*, 50 Wis. 155; s. c. 6 N. W. Repr. 568; citing *Smith v. Benson*, 1 Hill, 176; *Ford v. Cobb*, 20 N. Y. 344; *Tefft v. Horton*, 53 N. Y. 377; *Hunt v. Bay State Co.*, 97 Mass. 279. A prior lien of fixtures as real estate is not divested by a subsequent mortgage of them as chattels. *Smith v. Waggoner, supra*, citing *Frankland v. Moulton*, 5 Wis. 1.

² *Marsh v. Wade* (Wash. Ter.), 20 Pac. Repr. 578; *Merrill v. Ressler*, 37 Minn. 82; s. c. 5 Am. St. Rep. 822; 33 N. W. Repr. 117. But a reservation to the mortgagor of the right to sell, renders the mortgage void *ab initio* as to creditors and incumbrancers. *Brasher v. Christopher*,

As between the parties to the mortgage it is not necessary that the property should be so described as to be capable of identification by the written recital, or by the name used therein to designate it, provided its locality, kind and amount be indicated with some reasonable certainty, and so that the specific property intended to be conveyed can, by the use of the ordinary means of information, be certainly ascertained and designated.¹ As against creditors and purchasers, however, the decisions are not uniform in the application of the rule admitting parol evidence to identify the property.² Thus, where the property did not, with reasonable certainty, correspond to the description in the mortgage, although the description was such as did not necessarily exclude its being the property intended, yet as against a *bona fide* purchaser parol evidence was held not admissible to identify it.³ On

10 Colo. 284; s. c. 15 Pac. Repr. 403; Nash v. Norment, 5 Mo. App. 545.

¹ A description as "the whole of any stock of books and stationery now remaining in my possession," has been held sufficient. Wagner v. Watts, 2 Cr. C. Ct. 169. For similar general descriptions of merchandise and chattels held good, see Crow v. Red River Bank, 52 Tex. 362; Burditt v. Hunt, 25 Me. 419; Wells v. Wilcox, 68 Iowa, 708; s. c. 28 N. W. Repr. 29; Tolbert v. Horton, 33 Minn. 104; s. c. 22 N. W. Repr. 126; Fordyce v. Neal, 40 Mich. 705; Couklin v. Shelley, 28 N. Y. 360; s. c. 84 Am. Dec. 348; Harding v. Coburn, 12 Met. (53 Mass.), 333; Beach v. Derby, 19 Ill. 617; Van Heuzen v. Radcliff, 17 N. Y. 580; s. c. 72 Am. Dec. 483, with notes.

² A mortgage of "one sorrel horse" has been held void as to others than the parties, for want of a sufficient description. Montgomery v. Wight, 8 Mich. 143; and see also, Rhutasel v. Stephens, 68 Iowa, 627; s. c. 27 N. W. Repr. 786. A description of cattle and their increase was held bad, because there was no statement of the present or past ownership, nor of the place where they were or had been kept, although they were described by color, age and name being given. Warner v. Wilson, 73 Iowa, 719; s. c. 5 Am. St. Rep. 710; 36 N. W. Repr. 719. No presumption of ownership arises from the execution of a chattel mortgage. Everett v. Brown, 64 Iowa, 420; s. c. 20 N. W. Repr. 743. To give the county where animals are, is not a sufficient location. Muir v. Blake, 57 Iowa, 662; s. c. 11 N. W. Repr. 621; but see, *contra*, Brown v. Holmes, 13 Kan. 482; Shaffer v. Pickrell, 22 Kan. 619; Schmidt v. Bender, 39 Kan. 437; s. c. 18 Pac. Repr. 491; Wells v. Wilcox, 68 Iowa, 708.

³ The description was "one bay mare, two mare mules, one horse mule," and this was held not good for one black horse mule, nine years old, and one black mare mule, four years old. Stewart v. Jaques, 77 Ga. 365; s. c. 4 Am. St. Rep. 86; 3 S. E. Repr.

the other hand it has been held that a subsequent purchaser or mortgager is supposed, by proper inquiry, to obtain a knowledge of all facts of identification needful to his protection, and to purchase in view of that knowledge. If he purchases a bull known in the neighborhood by a particular name, he is chargeable with notice of that fact. A mortgage of a bull by that name would be as good against him as against the man who gave it. It would be a singular defense to be set up by him to the mortgage that, being a stranger, he discovered no such name on or about the bull, and, therefore, in fairness, could not be bound by a mortgage which undertook to identify the animal by the name.¹ The application of the rule largely depends on the facts of

283. "One pair of clay-bank horses," and "124 head of mules, now in the Territory of Kansas," held void for uncertainty. *Golden v. Cockrill*, 1 Kan. 259; s. c. 81 Am. Dec. 510. For other descriptions held uncertain, see cases in preceding note and *Gregory v. North Pacific*, 15 Or. 447; *Caldwell v. Trowbridge*, 68 Iowa, 150; *Winslow v. Merchant's Co.*, 4 Met. 306; s. c. 38 Am. Dec. 338; *Price v. McComas*, 21 Neb. 195; *Rowley v. Bartholomew*, 37 Iowa, 374; *Smith v. McLean*, 24 Iowa, 322; and for brief descriptions of animals held sufficient, see *Wheeler v. Becker*, 68 Iowa, 723; s. c. 28 N. W. Repr. 40; *Knapp v. Deitz*, 64 Wis. 31; s. c. 24 N. W. Repr. 471; *Peters v. Parsons*, 18 Neb. 191; s. c. 24 N. W. Repr. 687; *Brock v. Barr*, 70 Iowa, 399; s. c. 30 N. W. Repr. 652; *Crisfield v. Neal*, 36 Kan. 278; *Harris v. Woodard*, 96 N. C. 232; *Corbin v. Kincaid*, 33 Kan. 649; s. c. 7 Pac. Repr. 145; and for a proper mode of describing a stock of cattle, horses or mules, see *Kelly v. Reid*, 57 Miss. 89; *Jones on Chat. Mort.*, §59.

¹ *Willey v. Snyder*, 34 Mich. 60, per Cooley, C. J.; *Jones on Chat. Mort.*, §54. For descriptions of oxen and cattle, and horses, held sufficient, see *Fordyce v. Neal*, 40 Mich. 705; *Harris v. Kennedy*, 48 Wis. 500; s. c. 4 N. W. Repr. 651; 21 Albany L. J. 496; *Willey v. Shars*, 21 Neb. 712; s. c. 33 N. W. Repr. 418; *Lawrence v. Evarts*, 7 O. St. 194; *Jones on Chat. Mort.*, §61; *Schmidt v. Bender*, 39 Kan. 437; s. c. 18 Pac. Repr. 491.

The registry is not constructive notice to third persons of a lien upon other property substituted by agreement of the parties for that conveyed, although the description used in the mortgage might apply as well to that property as to the property originally intended. Thus, a mortgage was of "one horse," the mortgagor then owning a sorrel horse, which, with the consent of the mortgagee, he exchanged for a bay horse. The record was held not to impart notice of a lien on the latter, for upon inquiry outside the mortgage a person would have found that the mortgagor then owned the former, but not the latter horse. *Sharpe v. Pearce*, 74 N. C. 600; *Hunt v. Bullock*, 23 Ill. 320.

the given case, as will appear from the cases cited in the foot-notes. The rule of construction is very liberal as to the statement of the debt secured by the mortgage.¹

§254. Filing and Recording.

At common law a mortgage valid against creditors could be made only by a delivery of the property, and it was essential that the possession of the goods should be delivered to and retained by the mortgagee.² In most instances the intent of the statutes providing for the registry of chattel mortgages is to dispense with the necessity of a delivery of the property and to enable mortgagors to retain the possession thereof. In very many of the states, filing and indexing is equivalent to registry, and a chattel mortgage

¹ Page v. Ordway, 40 N. H. 253; Paine v. Benton, 32 Wis. 491; Machette v. Wanless, 1 Colo. 225; Henshaw v. Sumner, 23 Pick. (40 Mass.), 446; Byram v. Gordon, 11 Mich. 531.

As against attaching creditors, a mortgage is not valid unless there is a distinct and specific condition that can be clearly stated, on performance of which the property would be released. *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Rood v. Welch*, 28 Conn. 157. As to description of real property, see *ante*, §147; and of growing crops, *post*, §273.

A mortgage on a certain number of bushels of grain out of a larger quantity is void for uncertainty. *Clark v. Voorhes*, 36 Kan. 144; s. c. 12 Pac. Repr. 529; *Grimes v. Connell*, 23 Neb. 187; s. c. 36 N. W. Repr. 479; *Cass v. Gunnison*, 58 Mich. 108. "One six $\frac{1}{2}$ foot cut Plano harvester and binder," is not definite enough to charge constructive notice. *Plano Co. v. Griffith* (Iowa), 39 N. W. Repr. 214; citing *Hayes v. Wilcox*, 61 Iowa, 732; s. c. 17 N. W. Repr. 110; *Rhutasel v. Stephens*, 68 Iowa, 627; but good as against one having actual notice, citing *Cummings v. Tovey*, 39 Iowa, 195; *Clapp v. Trowbridge*, 38 N. W. Repr. 411.

For other descriptions held sufficient, see *Goff v. Pope*, 83 N. C. 127; *Moore v. Lehman*, 30 Kan. 514; s. c. 1 Pac. Repr. 804; *Spivey v. Grant*, 96 N. C. 214; s. c. 2 S. E. Repr. 45; *Leighton v. Stuart*, 19 Neb. 546; s. c. 26 N. W. Repr. 198; *Luce v. Moorehead*, 73 Iowa, 498; *Strolberg v. Brandenburg* (Minn.), 40 N. W. Repr. 356; *Barr v. Cannon*, 69 Iowa, 20; and insufficient, *Ormsby v. Nolan*, 69 Iowa, 130; s. c. 28 N. W. Repr. 569; *Stonebraker v. Ford*, 81 Mo. 532; *Everett v. Brown*, 64 Iowa, 420; s. c. 20 N. W. Repr. 743.

² *Russell v. Fillmore*, 15 Vt. 130; *Sturgis v. Warren*, 11 Vt. 433; 1 *Jones on Chat. Mort.*, §176. While this was the rule, there were exceptions to it. *Tregear v. Etiwanda Co.*, 76 Cal. 537, 539, citing *Bissell v. Hopkins*, 3 Cow. 166; s. c. 15 Am. Dec. 359; *Letcher v. Norton*, 5 Ill. 575; *Haines v. Crane*, 2 Pick. 610, in which the validity of

need not be recorded at length.¹ Registry usually dispenses with the necessity for delivery of the property to the mortgagee;² and on the other hand, delivery of the property to and possession by the mortgagee, dispenses with the necessity for record.³ The registry statutes do not make a chattel mortgage void as between the parties to it because of omission to file or record it, but they avoid it only as to creditors and purchasers in good faith;⁴ except that in a chattel mortgages were recognized though there had been no change of possession.

¹ *Brothers v. Mundell*, 60 Tex. 240; *Smith v. Jones*, 35 Kan. 492; *Loeb v. Hirsch*, 21 Neb. 392; s. c. 32 N. W. Repr. 205.

² *Berson v. Nunan*, 63 Cal. 550; *Call v. Gray*, 37 N. H. 428; s. c. 75 Am. Dec. 141; *Golden v. Cockrill*, 1 Kan. 259; s. c. 81 Am. Dec. 510; *Feurt v. Rowell*, 62 Mo. 524; *Harrington v. Brittan*, 23 Wis. 541; *Forbes v. Parker*, 16 Pick. (33 Mass.), 462; *Merrill v. Sandford*, 49 Me. 566. In several states however, the retaining possession, by the mortgagor has been treated as *prima facie* a badge of fraud, even though the mortgage be recorded; the statutes requiring registry, in these states, only adding another to the grounds on which a mortgage of personal chattels shall be void. *Wood v. Lowry*, 17 Wend. 492; *Horton v. Williams*, 21 Minn. 187; *Brunswick v. Clay*, 7 Neb. 137; *Pyle v. Warren*, 2 Neb. 241; and see also, *Brayley v. Bymes*, 25 Minn. 297. The mortgage is notice from the time of its deposit with the recorder. *Meherin v. Oaks*, 67 Cal. 57; s. c. 7 Pac. Repr. 47; *Case v. Hargadine*, 43 Ark. 144.

³ *First Nat. Bank v. Damm*, 63 Wis. 249; s. c. 23 N. W. Repr. 497; *Chipron v. Feikert*, 68 Ill. 284; *Nash v. Norment*, 5 Mo. App. 545; *Brown v. Webb*, 20 Ohio, 389; *Berson v. Nunan*, 63 Cal. 550; *State v. Cooper*, 79 Mo. 464; *Fromme v. Jones*, 13 Iowa, 474; *McTaggart v. Rose*, 14 Ind. 230; *Horner v. Stout*, 5 Colo. 166; *Morrow v. Reed*, 30 Wis. 81; *Lorton v. Fowler*, 18 Neb. 224; *Call v. Gray*, 37 N. H. 428; s. c. 75 Am. Dec. 141; and the rule applies even where registry is necessary to the lien. *Applewhite v. Harrell*, 49 Ark. 279; s. c. 5 S. W. Repr. 292.

Where the statute declared a mortgage void unless duly filed, or accompanied by a change of possession of the property, a change of possession as to part of the property included in an unfiled mortgage, held not to render the instrument valid even as to such portion of the property. *Benedict v. Smith*, 10 Paige, 126; and see also, *Wilson v. Voight*, 9 Colo. 614; s. c. 13 Pac. Repr. 726. The possession must be actual, not constructive merely. *Crandall v. Brown*, 18 Hun. 461.

⁴ As between the parties, the mortgage is good without record. *Keller v. Smalley*, 63 Tex. 512. 519; *Smith v. Acker*, 23 Wend. 653; *Lane v. Lutz*, 1 Keyes, 213; *Hayman v. Jones*, 7 Hun. 238; *Badger v. Batavia Co.*, 70 Ill. 302; *Lemay v. Williams*, 32 Ark. 166; *Kilbourne v. Fay*, 29 O. St. 264; *Williamson v. N. J. S. Ry.* 28 N. J. Eq. 277; *Winsor v. McLelland*, 2 Story, 492; *Crippen v. Fletcher*, 56 Mich. 386; *Bea-*

few states the statutes make them void as to all third persons without record.¹ As against an administrator or executor of the mortgagor, or his assignee in bankruptcy, or for the benefit of creditors, the general rule obtains that an unregistered mortgage is valid to the same extent as against the mortgagor himself.² The rule that where the statute

man v. Lowton, 37 Me. 543; Stewart v. Platt, 101 U. S. 731; Johnson v. Jeffries, 30 Mo. 423; Hackett v. Manlove, 14 Cal. 85; Smith v. Moore, 11 N. H. 55; McTaggart v. Rose, 14 Ind. 230.

The general rule is that an unfiled mortgage is good against creditors other than lien creditors. Martin v. Rothschild, 42 Hun. 410; Jones v. Graham, 77 N. Y. 628; Overstreet v. Manning, 67 Tex. 657; s. c. 4 S. W. Repr. 248; King v. Fraser, 23 S. Car. 543; Button v. Rathbone, 43 Hun. 137; but where the mortgagee delays filing his mortgage at the request of the mortgagor, he has been held estopped to assert it as against any creditor whose debt accrued during such delay. Sanger v. Guenther, 73 Wis. 354; affirming Standard Paper Co. v. Guenther, 67 Wis. 101; s. c. 30 N. W. Repr. 298. When the creditor has by attachment, execution or judgment, obtained a lien, he is then in a position to raise the question, though his lien was not fixed before the mortgage was filed. Thompson v. Van Vetchen, 27 N. Y. 568; Stewart v. Beale, 7 Hun. 405; Fraser v. Gilbert, 11 Hun. 634; Jones on Chat. Mort., §245.

¹ McDowell v. Stewart, 83 Ill. 564; Watson v. Thompson, 49 Ark. 83; Hughes v. Menifee, 29 Mo. App. 192; *post*, §269.

The Florida statute provides that "no mortgage of personal property shall be effectual or valid for any purpose whatever, unless such mortgage shall be recorded," or possession delivered within 20 days. McClel. Dig., p. 213, §1. Without record or delivery the mortgage is void as between the parties. Einstein's Sons v. Shouse, 24 Fla. —; s. c. 5 South. Repr. 380; Weed v. Stanley, 12 Fla. 166.

Invalidity of the mortgage, because of defective filing or affidavit, can be set up only by creditors of or purchasers from the mortgagor. Ellinbor v. Brakken, 36 Minn. 156; s. c. 30 N. W. Repr. 659; Marcum v. Coleman (Mont.), 19 Pac. Repr. 394; Smith v. Waggoner, 50 Wis. 155; s. c. 6 N. W. Repr. 568; Hunt v. Bay State Iron Co., 97 Mass. 279; Dwight v. Scranton (Mich.), 36 N. W. Repr. 752.

² Keller v. Smalley, 63 Tex. 512, 519; Williams v. Windsor, 12 R. I. 9; Roberts v. Austin, 26 Iowa, 327; Griffin v. Wertz, 2 Bradw. 487; Walker v. Miller, 11 Ala. 1081; Platt v. Preston, 3 Fed. Repr. 394; s. c. 9 Meyer's Fed. Dec., §1748; Winsor v. McLelland, 2 Story, 492; Yeatman v. Sav. Inst., 95 U. S. 764; Stewart v. Platt, 101 U. S. 731.

Some courts, however, have regarded the administrator or assignee as representing the creditors, and have accorded him the rights of a creditor as against an unregistered mortgage. Kilbourne v. Fay, 29 O. St. 264; Bingham v. Jordan, 1 Allen. 373; s. c. 79 Am. Dec. 748; *In re Werner*, 5 Dill. 119; Jones Chat. Mort., §§240, 244; *ante*, §211; Goodrich v. Michael, 3 Colo. 77; Gregg v. Sloan, 76 Va. 497.

prescribes a time within which conveyances may be recorded, a registry within the time will relate back to the delivery of the instrument, and if made after the time, will be effectual from the date when actually made, does not always apply to chattel mortgages; the intent of the statutes, in some instances, being to require a prompt record of the mortgage, under penalty that the lack of early registry shall invalidate the instrument as to third persons.¹

§255. Continued—Statutory Time—Bill of Sale.

Some of the statutes, however, do not, as to this matter of time, differ materially in their phraseology from those relating to real estate; and under these it is held that the chattel mortgagee's only risk in not recording within the time specified is that of having his lien postponed or overridden by other intervening liens, conveyances or judgments, while his mortgage remains unrecorded; the record of the mortgage being held to impart notice and secure its lien from whatever time such record may be actually made.² So, the record is sufficient from the time it is made, al-

¹ Rev. Stats. Ind., §4913; *Briggs v. Fleming*, 112 Ind. 313; s. c. 14 N. E. Repr. 86; *Drew v. Streeter*, 137 Mass. 460; *Sidener v. Bible*, 43 Ind. 230.

The fifteen days, under Pub. Stats. Mass., ch. 192, §1, are reckoned from the delivery of the mortgage, not its date. *Orcutt v. Moore*, 134 Mass. 48; *Shaughnessey v. Lewis*, 130 Mass. 355; but the presumption obtains, *prima facie*, that the mortgage was fully executed and delivered at the date stated therein. *Briggs v. Fleming*, *supra*; *Foster v. Perkins*, 42 Me. 168.

If the property be not delivered, an attachment made after the mortgage, but before its record, takes precedence, although the mortgage be then recorded within the fifteen days. *Drew v. Streeter*, *supra*. A mortgage recorded after the time is good between the parties, and may be made effectual against third persons by taking possession of the property before the rights of such other persons attach. *McTaggart v. Rose*, 14 Ind. 230. *Madison Bank v. Damm*, 63 Wis. 249; s. c. 23 N. W. Repr. 497; *Morrow v. Reed*, 30 Wis. 81. In Kansas a chattel mortgage may be recorded at any time, and is valid from the time of its record. *McVay v. English*, 30 Kan. 368.

² *Ante*, §132; *Nichols v. Hampton*, 46 Ga. 253; *Hardaway v. Semmes*, 24 Ga. 305; *Johnson v. Patterson*, 2 Woods, 443; s. c. 9 Myer's Fed. Dec. §1783.

though the statute declares that, unless deposited for record "forthwith," the mortgage shall be void.¹

Where the terms of the statute do not forbid such construction, a bill of sale absolute on its face, but in reality a mortgage, the condition being in parol, is held to come within the purview of the statutes requiring the registry of chattel mortgages, and the filing of such instrument will impart notice of a mortgage.²

§256. Continued—Filing and Withdrawal.

Usually a chattel mortgage is considered filed when it has been delivered to the proper officer for registry, and by

¹ *Wilson v. Leslie*, 20 Ohio, 161; *Gibson v. Warden*, 14 Wall. 244; Where the mortgage is to be transcribed at length, such recording will relate back to the time of the filing or noting by the recorder, as in case of deeds. *Ante*, §17; *Monaghan v. Longfellow* (Me.), 17 Atl. Repr. 74; *Head v. Goodwin*, 37 Me. 181; *Craig v. Dimock*, 47 Ill. 308; and between the time of filing and of transcription, the filing imparts full notice. *Jordan v. Farnsworth*, 15 Gray, 517; *Monaghan v. Longfellow*, *supra*; and if the filing be omitted in the transcription, such omission is immaterial. *Monaghan v. Longfellow*; but if no filing or noting was indorsed on the instrument or index, the registry imparts notice only from the time of the transcription. *McLarren v. Thompson*, 40 Me. 284; *Holmes v. Sprowl*, 31 Me. 73; and see *Holman v. Doran*, 56 Ind. 358; *Hoadley v. Hadley*, 48 Ind. 452; *Houghton v. Burnham*, 22 Wis. 301.

² *Nicklin v. Betts*, 11 Or. 406; s. c. 50 Am. Rep. 477; *Hurd v. Brown*, 37 Mich. 484; *First Nat. Bank v. Damm*, 63 Wis. 249; s. c. 23 N. W. Repr. 497; *Preston v. Southwick*, 42 Hun. 291; *Landon, J.*, dissenting; *Bird v. Wilkinson*, 4 Leigh, 266; *Dukes v. Jones*, 6 Jones (N. C.), L. 14; *Kuhn v. Graves*, 9 Iowa, 303; *Shaw v. Wiltshire*, 65 Me. 485. The question may be affected by statutes requiring defeasances and conditional sales to be recorded, as well as by the terms of the chattel mortgage acts. See generally, *ante*, §§136-139. *Ing v. Brown*, 3 Md. Ch. 521; *Gaither v. Mumford*, *Taylor's Term.* (N. C.), 167; *Sanders v. Papoon*, 4 Fla. 465; *Cooper v. Brock*, 41 Mich. 488; s. c. 2 N. W. Repr. 660.

Where A. mortgaged chattels, and then before the record of the mortgage, put them into a partnership with B., it was held that the mortgage bound only A.'s half interest, record being necessary to the lien in that state. *Ringo v. Wing*, 49 Ark. 457; s. c. 5 S. W. Repr. 787.

In Florida record is necessary even as between the parties; but as against the mortgagor, it may be made after the 20 days, and after the debt is due, if before suit begun for foreclosure. *Einstein's Sons v. Shouse*, 24 Fla. —; s. c. 5 South. Repr. 380.

him received to be kept on file.¹ The form of his indorsement is immaterial if he makes the proper disposition of the paper;² but where, instead of properly indexing and depositing the mortgage, he marks it "filed for record," and transcribes it into the book for the registry of deeds, this has been held not evidence of a deposit and filing as required by statute.³ A failure to index the mortgage will not usually invalidate the record; but under the terms of some of the statutes, it will have this effect.⁴ The delivery of a mortgage to the recorder while absent from his office after business hours, is not effectual until it is taken to the office and there filed, although it is marked by him as filed at the time he receives it.⁵ The rules as to what character of delivery to the recorder will constitute a sufficient and valid deposit for record, or filing, are substantially the

¹ *Gorham v. Summers*, 25 Minn. 81; *Jones on Chat. Mort.*, §271; *Holman v. Doran*, 56 Ind. 358; *Heflin v. Slay*, 78 Ala. 180.

² Where the statute required the clerk to note the "time of receiving" the instrument, and he marked it "filed for record" at a certain date, this was held a sufficient indorsement. *Cook v. Halsell*, 65 Tex. 1. In Indiana, the time when the clerk received the mortgage may be shown by parol. *Holman v. Doran*, 56 Ind. 358; *Stonebraker v. Kerr*, 40 Ind. 186.

³ *Brothers v. Mundell*, 60 Tex. 240. Where the statute gives the effect of notice to the filing, and a proper filing or deposit is shown, the validity of the record is not affected by the fact that the officer transcribes the instrument in the wrong book. *Head v. Goodwin*, 37 Me. 181; *ante*, §§16-18, 140.

⁴ Indexing held essential in Maine. *Handley v. Howe*, 22 Me. 560; at least until the instrument is recorded at length. *McLarren v. Thompson*, 40 Me. 284. See indexing, *ante*, §142. Not essential in Wisconsin. *Smith v. Waggoner*, 50 Wis. 155; s. c. 6 N. W. Repr. 568.

⁵ *Hathaway v. Howell*, 54 N. Y. 97, where the mortgagee employs the mortgagor to file the mortgage, and he, for purposes of his own, and without the mortgagee's knowledge, asks the clerk "to place it at the bottom of the pile, so that nobody would see it," saying that he does not want anybody to know he has given it, such request is not within the scope of his agency, and does not prejudice the mortgagee's rights. *Cass v. Jewett*, 13 Wis. 498; s. c. 80 Am. Dec. 752. But where the request was to "keep it out of sight for a few days," this was held equivalent to an instruction not to record until further orders. *Low v. Pettingill*, 12 N. H. 337.

same in the case of chattel mortgages as in that of deeds.¹ When a chattel mortgage is withdrawn from the files, it does not operate as notice during the time it is withdrawn; but upon its return, no second indorsement of filing, it seems, is necessary.² In Nebraska, where a chattel mortgage statute provides that a power of sale in a mortgage can be enforced only where the mortgage has been filed, it has been held that the power cannot be exercised while the mortgage is withdrawn, although it has been withdrawn for the purpose of foreclosure.³ The delivery of the instrument to the mortgagee is, of course, as essential to the validity of the record of a chattel mortgage as in the case of a deed.⁴

§257. Re-filing.

In a majority of the states the statutes require that in order to keep alive the lien of a chattel mortgage, the instrument shall be re-filed at or before the expiration of a

¹ *Ante*, §§140, 141. The mortgagor, with the assent of the mortgagee, may file the mortgage for record. *In re Guyer*, 69 Iowa, 585; s. c. 29 N. W. Repr. 826; but where the mortgagees had no knowledge whatever of the mortgage, such filing held of no avail. *Wallis v. Taylor*, 67 Tex. 431. Where the mortgagee, at the request of the mortgagor, withholds the mortgage from record, though there be no actual intent to defraud creditors, yet this operates as a fraud on creditors who extend credit on the faith of an unincumbered record. *Standard Paper Co. v. Guenther*, 67 Wis. 101; s. c. 30 N. W. Repr. 298; *Sanger v. Freie Press Co. (Wis.)*, 41 N. W. Repr. 436; and see also, *Root v. Harl*, 62 Mich. 420; s. c. 29 N. W. Repr. 29.

² *Johnson v. Burden*, 40 Vt. 567; s. c. 94 Am. Dec. 436, and cases *ante*, §141. *Contra*, the withdrawal of a chattel mortgage for a temporary purpose will not invalidate its lien, and the mortgagee will not be prejudiced by a levy made during the time it is so withdrawn. *Wilson v. Leslie*, 20 Ohio, 161.

³ *Word v. Watson*, 24 Neb. 592, citing *Loeb v. Hirsch*, 21 Neb. 392; s. c. 32 N. W. Repr. 205; and see also, *Warner v. Comstock*, 55 Mich. 615; s. c. 22 N. W. Repr. 64.

⁴ *Ante*, §144. Where a debtor executed a mortgage to his creditor, and new notes extending the time, had the mortgage recorded and then told the creditor of it, but not of the new notes, and the creditor said it was all right; it was held that as against an attachment of the property, there was no delivery of the mortgage. *Nat. State Bank v. Morse*, 73 Iowa, 174; s. c. 34 N. W. Repr. 803; citing *Day v. Griffith*, 15 Iowa, 104; *Cobb v. Chase*, 54 Iowa, 253; s. c. 6 N. W. Repr. 264.

given period—usually one year from the previous filing.¹ Public policy requires that the state of personal property and the incumbrances on it, from year to year, should be made known in one way or another to all interested; and these renewals are required not only for the information of general creditors of the mortgagor, but also for the information of those who may have become purchasers or mortgagees in good faith during the continuance of the earlier mortgage.² Re-filing is not necessary as between the mortgagor and mortgagee;³ nor, where actual notice is held availing, is it necessary as against a subsequent mortgagee with notice.⁴ The fact that default has been made, and the mortgage has become absolute by its terms, does not excuse the omission to re-file; as until something further than mere forfeiture has occurred, the mortgagor is to the public the apparent owner, and the same reason remains for re-filing that existed before.⁵ Nor is it excused by the fact that the mort-

¹ Reynolds v. Case, 60 Mich. 76; s. c. 26 N. W. Repr. 838; Cooper v. Koppes, 45 O. St. 625; s. c. 15 N. E. Repr. 662; *In re Leland*, 10 Blatchf. 593; Wood v. Weinart, 104 U. S. (14 Otto), 786; Fish v. N. Y. Paper Co., 29 N. J. Eq. 610; *post*, ch. 11.

In Wisconsin the period is two years; Rev. Stats., §2315; in Dakota, three years, and in Nebraska, five years. In some states that do not provide for re-filing, the record holds good for only a fixed period, which, in Illinois, Colorado and Minnesota, is two years; in Delaware, three years, and in Wyoming, two months beyond the time stipulated for foreclosure.

² Marsden v. Cornell, 62 N. Y. 215; Meech v. Patchin, 14 N. Y. 71. Under the New York statute of April 28, 1864, no subsequent re-filing after the first was necessary in order to keep the mortgage a continuing security. Canal Boat Independence, 9 Ben. 395; Newell v. Warren, 44 N. Y. 244. This has been changed so as to require annual re-filings. Laws 1879, ch. 418; and of 1873, ch. 501.

³ Fish v. N. Y. Paper Co., 29 N. J. Eq. 610. Where a junior chattel mortgage recites the priority of a senior one, a failure to file and renew the elder is immaterial so far as the mortgagee in the junior instrument is concerned. Flory v. Comstock, 61 Mich. 522; s. c. 28 N. W. Repr. 701.

⁴ Manwaring v. Jemison, 61 Mich. 117; s. c. 27 N. W. Repr. 899; Nat. Bank v. Sprague, 21 N. J. Eq. 530; Lewis v. Palmer, 28 N. Y. 271; Thompson v. VanVetchen, 6 Bosw. 373; 3 Abb. Pr. 458; Wetherell v. Spencer, 3 Mich. 123.

⁵ Porter v. Parmley, 52 N. Y. 185; Succession of Ynogoso, 13 La. Ann. 559. But advertising the property for sale within the time for

gagor becomes a non-resident of the state during the year, as the rule operates as well where the re-filing is rendered impossible by such removal as where it is omitted from any other cause.¹ Where the statute requires a true copy of the mortgage to be re-filed, a re-filing of the original instrument, with the proper indorsements thereon, has been held a sufficient compliance.² It seems that where a second mortgage is taken within the year from the filing of the first, but with only constructive notice of the first, the second mortgagee may claim the advantage of a neglect to re-file the prior mortgage in time, though he have actual notice at the time of such failure.³ Where the property has been so taken and converted within a year after filing as to give the mortgagee a cause of action for such taking, re-filing is not necessary.⁴

§258. Re-filing—Time Within Which to be Done.

A re-filing must be done within the time limited by statute for that purpose; and it is ineffectual if done either before or after that time.⁵ Usually the requirement is that the re-filing obviates the necessity of such re-filing, although the sale does not take place until after the expiration of the year. *Otis v. Sill*, 8 Barb. 102.

¹ *Dillingham v. Bolt*, 37 N. Y. 198; s. c. 4 Abb. Pr. N. S. 221; overruling *Dillingham v. Ladue*, 35 Barb. 38.

² *Paine v. Mason*, 7 O. St. 199; *Stockman v. Allard*, 2 Hun. 67 s. c. 4 Th. & C. 279; and see *Fitch v. Humphrey*, 1 Den. 163.

³ *Paine v. Mason*, 7 O. St. 199, citing *Gregory v. Thomas*, 20 Wend. 17.

⁴ *Case v. Jewett*, 13 Wis. 498; s. c. 80 Am. Dec. 752. A re-filing after the expiration of the year, held good against an execution issued subsequently to the re-filing. *Nixon v. Stanley*, 33 Hun. 247. For case where, as against the mortgagor, re-filing was held excused because of proceedings begun, see *Steward v. Cole*, 43 Hun. 164.

⁵ *Cooper v. Koppes*, 45 O. St. 625; s. c. 15 N. E. Repr. 662; *Rice v. Kohn*, 70 Wis. 323; s. c. 35 N. W. Repr. 465; *J. I. Case Co. v. Campbell*, 14 Or. 460; s. c. 13 Pac. Repr. 324; *Newell v. Warner*, 44 Barb. 258; *Biteler v. Baldwin*, 42 O. St. 125; *Natl. Bank v. Sprague*, 20 N. J. Eq. 13.

Thus, where the mortgage was filed Feb. 23, 1882, and the affidavit of renewal Jan. 18, 1884, this was held not a compliance with the statute requiring the re-filing to be made within thirty days next preceding the expiration of two years. *Rice v. Kohn*, *supra*. See *Gordon v. Knox*, 31 La. Ann. 284; *ante*, §173. In New Mexico the statute pro-

mortgage shall be re-filed within thirty days next preceding the expiration of one year from the last filing.¹ If the last day for re-filing falls on a Sunday, the mortgage must be re-filed on or before the Saturday preceding.² Purchasers and incumbrancers, who become such before the expiration of the year, or other statutory period from the original filing, cannot take advantage of an omission to re-file the mortgage, since, having notice of it at the time their rights accrued, they took title subject to it. The statute is not intended to relieve them from valid incumbrances, nor to place them in a better position than was the mortgagor at the time they acquired title from him.³

§259. Re-filing Excused by Possession.

Where the mortgagee takes actual possession of the property, the necessity for re-filing is obviated, as such possession operates as full notice; and is effectual, though taken after the time for re-filing has expired.⁴ There must, however, vides that a re-filing after the time shall be effectual except as against rights that have attached before the re-filing; and so in Michigan. How. Stats., §6196; *Wade v. Strachan* (Mich.), 39 N. W. Repr. 382.

¹ Rev. Stats. Wis., §2315, and see statutes in next chapter. A re-filing after the time will not revive and continue the lien as to third persons for a year after such re-filing. *Newell v. Warner*, *supra*, overruling *Swift v. Hart*, 12 Barb. 530; and see *Adams v. Daunis*, 29 La. Ann. 315; *ante*, §173.

² *Paine v. Mason*, 7 O. St. 199; *Alderman v. Phelps*, 15 Mass. 225; *Nitchie v. Townshend*, 2 Sandf. 299. A failure to re-file does not invalidate the mortgage as against the mortgagor. *Nat. Bank v. Sprague*, *supra*.

³ *Wade v. Strachan* (Mich.), 39 N. W. Repr. 582; *Meech v. Patchin*, 14 N. Y. 71; *Nat. Bank v. Sprague*, *supra*; *Wiles v. Clapp*, 41 Barb. 645; *Wray v. Fedderke*, 43 N. Y. Sup. Ct. 335. In *Wade v. Strachan*, *supra*, there is a full presentation of the matter; the court citing in support of the decision, *Wetherell v. Spencer*, 3 Mich. 123; *Manwaring v. Jemison*, 61 Mich. 117; s. c. 27 N. W. Repr. 899; and overruling *Briggs v. Mette*, 42 Mich. 12; s. c. 3 N. W. Repr. 231; *Campbell, J.*, dissenting. A distinction seems to be taken where the subsequent mortgagee has only constructive and not actual notice at the time his rights accrue. See *Paine v. Mason*, 7 O. St. 199; *Gregory v. Thomas*, 20 Wend. 17; *Day v. Munson*, 14 O. St. 488.

⁴ *Wood v. Weimar*, 104 U. S. 786; *Dayton v. People's Sav. Bk.* 23 Kan. 421; *Porter v. Parmley*, 52 N. Y. 185; *Otis v. Sill*, 8 Barb. 102; *Nat. Bank v. Sprague*, 21 N. J. Eq. 530.

In Ohio it has been held that where neither of two mortgages on the same property is re-filed in time, if the junior mortgagee, whose mort-

be an actual change in the possession of the property; a mere verbal delivery, or a change by which the mortgagor and mortgagee are in joint possession will not be sufficient.¹

§260. Re-filing—Affidavit of the Debt.

The usual statutory provision in reference to re-filing, is that the mortgagee shall make a statement by affidavit exhibiting his interest in the mortgage at that date, which shall be attached to the instrument already on file.² This interest of the mortgagee refers to the amount of his pecuniary interest, not to the capacity in which he holds it; nor need the person to whom the money is due be specifically mentioned.³ This statement is to be made by the mortgagee, or his attorney; it is unavailing if made by a third person without authority, especially the mortgagor, whose interests might be promoted by a false statement.⁴ It might be difficult to obtain a new mortgage at the end of the year, or statutory period, as there would be no obligation on the part of the mortgagor to execute it; and the statute intends this statement as a convenient substitute for a new mortgage, and one within the control of the creditor.⁵ In its recitals as to the interest of the mortgagee and the amount of the debt, the statement is subject to substantially the same rules as the mortgage itself. It should give information as to the interest or amount due with such certainty as will enable others to judge how far it may be safe

gage is last filed, first gets possession of the property, he is entitled to hold it against the other. Each mortgage is, after failure to re-file, unprotected by the registry laws.

¹ *Menzies v. Dodd*, 19 Wis. 443; *Porter v. Parmley*, 52 N. Y. 185; s. c. 34 N. Y. Sup. Ct. 398; 13 Abb. Pr. N. S. 104.

² *Manwaring v. Jemison*, 61 Mich. 117; How. Stats. Mich., §6196; and see statutory laws in next chapter. Without a sufficient statement the re-filing is ineffectual. *Marsden v. Cornell*, 62 N. Y. 215; *Fitch v. Humphrey*, 1 Den. 163.

³ *Lowery v. Harrison*, 2 N. J. L. 51. An error in the statement, by which the amount due is materially overstated, will vitiate it. *Ely v. Carnley*, 3 E. D. Smith, 489; affirmed in s. c. 19 N. Y. 496.

⁴ *Newell v. Warner*, 44 Barb. 258.

⁵ *Platt v. Stewart*, 13 Blatchf. 481.

and prudent to give credit to the mortgagor.¹ The nature of the matter, however, may be such that it will be impossible for the mortgagee to state the amount remaining due with entire accuracy, and this is not required.² It is only necessary that the statement should notify creditors of the extent of the mortgagee's lien.³ The mortgagee cannot afterwards, as against creditors or incumbrancers, claim a greater amount than that stated in the affidavit for re-filing, although such sum was an understatement of the true amount.⁴

§261. Place of Record—Residence of Mortgagor.

Usually the statutes require a chattel mortgage or other conveyance of personal property to be recorded in the county, city or town where the mortgagor or grantor resides; or, especially if he be a non-resident of the state, in the county or town where the property is at the time.⁵ The

¹ It should show especially what property is subject to the mortgage, and what is the amount claimed to be an incumbrance on it; and where a detailed schedule is an important part of the mortgage, it is as essential to the statement. *Platt v. Stewart, supra.*

A statement that a certain named sum "constitutes the amount of interest" of the mortgagees in the property mentioned in the mortgage, held sufficient. *Manwaring v. Jemison*, 61 Mich. 117; s. c. 27 N. W. Repr. 899; How. Stats., §6196.

² That "somewhere about the sum of sixty dollars, as near as can be ascertained," remained unpaid, held a sufficient statement. *Dillingham v. Bolt*, 37 N. Y. 198. A failure in the statement to give a credit of two dollars upon a debt of several hundred dollars, held immaterial. *Patterson v. Gillies*, 64 Barb. 563.

³ *Miller v. Jones*, 15 Nat. Bank Reg. 150.

⁴ *Beers v. Waterbury*, 8 Bosw. 396. A statement referring merely to the mortgage and setting forth "that there is due and remaining unpaid on said mortgage, the conditions as mentioned in said mortgage lease; that his interest in the chattels therein described remains unchanged, and are hereby renewed for the amount above written," held not sufficient; as no one by inspecting the instruments could determine whether the lessee had observed the various covenants in the lease or not, nor whether any rent remained due. *Briggs v. Mette*, 42 Mich. 12; s. c. 3 N. W. Repr. 231.

⁵ *Davis v. Lofton*, 6 Tex. 489; *Reynolds v. Case*, 60 Mich. 76; *Bickley v. Keenan*, 60 Ala. 293; *Grand Island Co. v. Frey* (Neb.), 40 N. W. Repr. 599; *Platt v. Stewart*, 13 Blatchf. 481; *Bannon v. Bowler*, 34 Minn. 416; s. c. 26 N. W. Repr. 237; *Martin v. Rothschild*, 42 Hun. 410.

object in requiring registry at the place of the transaction, or where the mortgagor resides, is to guard against secret liens, and at the same time to convey notice to the public with as much certainty as to place of record as may be possible, taking the character of the property into consideration.¹ That the mortgagor conducts a branch of his business in another county than where he resides, will not authorize the record of the mortgage in such other county;² nor will his temporary absence from home on business or pleasure authorize such record.³ Where the mortgagor is on the eve of removal to another county or town, and the property is situated in such other place, to which he does remove as contemplated, there are decisions that the registry should be made in such other place,⁴ and other cases holding that the record must be made at the place of his residence where the mortgage was executed.⁵ Where the statute requires only that the mortgage shall be recorded in the county of the mortgagor's residence, and it is so recorded, it is immaterial

¹ Kanaga v. Taylor, 7 O. St. 134; s. c. 70 Am. Dec. 62; Hoit v. Remick, 11 N. H. 285; First Nat. Bk. v. Damm, 63 Wis. 249; s. c. 23 N. W. Repr. 249.

² Weaver v. Chunn, 99 N. C. 431; s. c. 6 S. E. Repr. 370.

³ Boyd v. Beck, 29 Ala. 703. The declarations of the mortgagor, made at the time of executing the mortgage, are competent evidence for the purpose of proving the place of his residence. Veazie v. Somerby, 5 Allen (87 Mass.), 280; and so of a recital of residence in the mortgage. Chaytor v. Brunswick, 71 Tex. 591.

⁴ Where A., living in one county, executed a mortgage on a crop to be grown on land bought by him in another county, to which he contemplated removing, such mortgage was properly registered in the latter county, the mortgagee having actually made such removal after the registry of the paper. Harris v. Jones, 83 N. C. 317, citing Simpson v. Morris, 3 Jones, 411.

⁵ Where the mortgagor had bought a farm in a town other than that of his residence, together with the stock thereon, and had given a mortgage upon the stock, and in a few days thereafter moved his residence to the farm, it was held that the filing of the mortgage in the town to which he had removed was ineffectual against a *bona fide* purchaser. The statute is to be strictly construed, and the mortgagee cannot substitute a different place of record, though he may think that by so doing much better information of the existence of the mortgage will be afforded. Powers v. Freeman, 2 Lans. 127; Jones on Chat. Mort., §251; and see also, Cohen v. Chandler, 79 Ga. 427; s. c. 7 S. E. Repr. 160.

that the property is situated in another county, and is never thereafter brought to the place of residence of the mortgagor.¹ A recital in the mortgage of the residence of the mortgagor as in a certain county, has been held *prima facie* evidence of that fact, and that the mortgage was properly recorded there, even as against a subsequent purchaser of the property.² While such a recital is conclusive against the mortgagor, it is certainly not so as against third parties, whose rights depend, not upon the representations of the mortgagor, but upon the fact of such residence.³

§262. Continued—Non-residents—Joint Mortgagors.

Where the mortgagor or grantor is a non-resident of the state, the statutes usually require the registry of the instrument to be made in the county where the property is situate at the time of the transaction.⁴ If, in a joint mortgage, some of the mortgagors are residents and others non-residents, under a statute providing that the mortgage shall be recorded in the county where the mortgagor resides, if a resident of the state, and if not, then in the county where the property is situate, the registry must be made in the counties where the residents live, and also, as to the non-residents, in the county where the property is situated.⁵ Where the statute provides only for registry at the place of the mortgagor's residence, and makes no provision as to non-residents, there can be no valid registry of a chattel mortgage executed by a non-resident. As the statute does not provide for such case, the mortgage can be made effect-

¹ Singleton v. Young, 3 Dana, 559; Vaughn v. Bell, 9 B. Mon. 447. "In Sierra county, Cal." held a sufficient statement of the place of residence of the parties, required by statute to be given in the mortgage. Ede v. Johnson, 15 Cal. 53.

² Chaytor v. Brunswick-Balke Co., 71 Tex. 591; s. c. 10 S. W. Repr. 250.

³ Stewart v. Platt, 101 U. S. 731, 737; and see also, Smith v. Jenks, 1 Den. 580; Bither v. Buswell, 51 Me. 601; Jones Chat. Mort., §256.

⁴ Code of Ga., §1956; Hunt v. Bowen, 75 Ga. 662; Bickley v. Keenan, 60 Ala. 293.

⁵ De Courcey v. Collins, 21 N. J. Eq. 357; affirming s. c. 19 N. J. Eq. 115; Jones on Chat. Mort., §252.

ual only by the mortgagee taking and holding actual possession of the property.¹ In such case, the record of the mortgage in the state where the mortgagor resides is not constructive notice to creditors, and purchasers from him, in the state where the property is situate.² Where the statute requires registry to be made in the county of the mortgagor's residence, in a case of two or more joint mortgagors, the registry must be made in each county where any one of them resides.³

§263. Residence of Corporation.

Under a statute providing merely that the mortgage shall be recorded in the county of the mortgagor's residence, there can be no valid registry of a mortgage of personal property in such state, executed by a foreign corporation.⁴ That the corporation has a place of business in such state, and in the county where the property is situate, does not make it a resident, any more than would such facts fix there the residence of a non-resident individual.⁵ The place of residence of a corporation is where it keeps its principal office; and when a mortgage is properly recorded at that place, it need not be registered in each county or town in the state where any of the stockholders may reside.⁶

¹ Smith v. Moore, 11 N. H. 55; Montgomery v. Wight, 8 Mich. 143; Cook v. Hager, 3 Colo. 386.

² Golden v. Cockrill, 1 Kan. 259; s. c. 81 Am. Dec. 510; Crosby v. Huston, 1 Tex. 203.

³ Aultman v. Guy, 41 O. St. 598, citing Rev. Stats., §§4150-4155. Where the owner of a livery stable, residing in Vermont, kept horses in New Hampshire during the traveling season of three months in each year, it was held that they were "situate" in New Hampshire so as to require a mortgage of them to be recorded there. Lathe v. Schaff, 60 N. H. 34.

⁴ Watson v. Thompson, 49 Ark. 83; s. c. 4 S. W. Repr. 62, citing Mansfield's Dig., §4742; Cook v. Hager, 3 Colo. 386; Briggs v. Leitelt, 40 Mich. 80; s. c. 1 N. W. Repr. 942.

⁵ "The corporation must dwell in the place of its creation, and cannot migrate to another sovereignty." C. J. Taney, in Bank of Augusta v. Earle, 13 Pet. 588; and see also, *Ex parte Schollenberger*, 96 U. S. 377; Stafford v. American Mills Co., 13 R. I. 310; Cowardin v. Universal Life Ins. Co., 32 Gratt. 446; Blackstone M'fg. Co. v. Inhabitants of Blackstone, 13 Gray (79 Mass.), 488; Watson v. Thompson, *supra*.

⁶ Wright v. Bundy, 11 Ind. 398; Nelson v. Neil, 15 Hun. 383.

§264. Residence of Partnership.

The residence of a partnership is not determined by the place where its business is carried on, or its principal office is situate; and hence a chattel mortgage executed by a partnership must be recorded in each county or town where a member of the firm resides.¹ The fact that the members board for a part of the year at the place where the business is carried on, does not change the rule.² Where one of the partners is a non-resident, registry in the county where the other resides, and where the partnership has its usual place of business, is sufficient.³

§265. Removal of Property.

In a few states it is provided that when mortgaged property is removed to another county, the mortgage shall also be registered in such other county within a given time.⁴ Unless, however, the statute so require, it is not necessary that the mortgage should be again recorded because the property may have been removed to another place.⁵ The

¹ Granger v. Adams, 90 Ind. 87; Morrill v. Sanford, 49 Me. 566; Rich v. Roberts, 48 Me. 548; s. c. 50 Me. 395; Stewart v. Platt, 101 U. S. 731; s. c. 9 Myer's Fed. Dec., §§1773-1781, three justices dissenting.

² Briggs v. Leitelt, 41 Mich. 79; s. c. 1 N. W. Repr. 942.

³ Hubbarston Lumber Co. v. Covert, 35 Mich. 254. Where the mortgagors all reside in the state, but in different townships or cities, a filing of the mortgage in some of the townships or cities, but not in all wherein the mortgagors reside, is not a compliance with the statute, and is of no validity or effect whatever. Kane v. Rice, 10 Nat. Bank Reg. 469, 474. But where the property is partly in each of two states, if the mortgage has been duly recorded in one of them, its validity in that state for the property therein is not affected by its invalidity in the other. *In re Soldiers' Business, etc., Co.*, 3 Ben. 204.

⁴ In Texas the mortgagee has four months from the time of the removal of the property within which to register his mortgage in such other county. Rev. Stats., §4341. Re-record is not necessary unless the property remains in the second county the full time (six months) during which the statutory re-record may be made. Wilkinson v. King, 81 Ala. 156.

⁵ Cool v. Roche, 20 Neb. 550; s. c. 31 N. W. Repr. 367; Grand Island Co. v. Frey (Neb.), 40 N. W. Repr. 599; Kanaga v. Taylor, 7 O. St. 134; s. c. 70 Am. Dec. 62; Pease v. Odenkirchen, 42 Conn. 415; Elson v. Barrier, 56 Miss. 394; Bevans v. Bolton, 31 Mo. 437; Feurt v. Rowell, 62 Mo. 524; Beall v. Williamson, 14 Ala. 55; Brigham v. Weaver, 6 Cush. 298; Barrows v. Turner, 50 Me. 127; Hicks v. Williams,

rights of the mortgagee will be protected by the record already made, and the duty is cast upon the creditor, or purchaser of the property, of ascertaining the title of the party in possession. If, contrary to the statute, a mortgage be registered in a county where the property is not situate, a subsequent removal of the property to such county will not give the record validity from that time, as a subsequent purchaser would not look there for a mortgage executed while the property was in a different county.¹

§266. Removal to Another State—Comity.

When the property is removed to another state, the mortgage will, by the comity of nations, be enforced there, and the law of the place of the contract will be given effect as to its nature, validity and construction.² Although the mortgage be not executed in conformity with the laws of such other state, yet it will be effectual to hold the property there if executed according to the law of the place of the contract, and from which the property is removed.³ The rule, however, is subject to some exceptions. The courts of one state are under no legal obligation to thus give effect to the laws of another state, and in some instances they refuse to do so, where, in giving them effect, 17 Barb. 523; *Hoit v. Renick*, 11 N. H. 285; *Smith v. McLean*, 24 Iowa, 322.

¹ *Lane v. Mason*, 5 Leigh, 320; *ante*, §190.

In Nebraska, where the property is removed to another county, there can be no statutory foreclosure of the mortgage until it is re-recorded in such other county. *Loeb v. Milner*, 21 Neb. 702; s. c. 32 N. W. Repr. 205.

² *Lafayette v. Metcalf*, 29 Mo. App. 384; *Hubbard v. Andrews*, 76 Ga. 177; *Smith v. Hutchings*, 30 Mo. 385; *Rice v. Cobb*, 9 Cush. 303; *DeLeon v. Moore*, 14 How. (55 U. S.), 253, marriage contract; *Bank of U. S. v. Lee*, 13 Pet. (38 U. S.), 107; *Kanaga v. Taylor*, 7 O. St. 134; s. c. 70 Am. Dec. 62; *Edgerly v. Bush*, 81 N. Y. 199; *Ames v. Warren*, 76 Ind. 512; s. c. 40 Am. Rep. 258; *Nichols v. Mose*, 25 Hun. 640; *Hall v. Pillow*, 31 Ark. 32; *Tyler v. Strang*, 21 Barb. 198; *Barker v. Stacy*, 25 Miss. 471; *Ryan v. Clanton*, 3 Strobb. L. 411; *Cobb v. Buswell*, 37 Vt. 337.

³ *Kanaga v. Taylor*, *supra*; *Ferguson v. Clifford*, 37 N. H. 86, and cases above.

they would contravene what they deem an important rule of public policy or justice, and to the detriment of their own citizens.¹ The courts of Louisiana, where a chattel mortgage is unknown, do not feel bound by the rule of comity to enforce such a mortgage made in another state.²

§267. Comity of States—Record Notice.

The weight of authority seems to extend the rule of comity to embrace the principle of constructive notice by registry, and to hold even as against creditors and purchasers of the mortgagor or grantor, that no further record of the conveyance is necessary in the state to which the property is removed.³ In some states the statutes require another record of the instrument in case of such removal of the property to their territory;⁴ and in others the rule of com-

¹ The judicial tribunals of each state must determine how far comity is to be permitted to interfere with the domestic interests and policy of the state. If a mortgagor be permitted to retain possession of the property, and he brings it into Pennsylvania, the rights there of creditors and purchasers without notice will be protected. *MacCabe v. Blymyer*, 9 Phila. 615. See, *contra*, as to creditors, *Mumford v. Cante*, 50 Ill. 370.

² *Delop v. Windsor*, 26 La. Ann. 185. In other instances, however, personal contracts relating to movables will be enforced according to the *lex loci contractu* where the law of Louisiana gives a remedy. *Tyree v. Sands*, 24 La. Ann. 363; *Chaffee v. Heyner*, 31 *Id.* 594; and see *Harris v. Walworth*, 129 U. S. 355, in which there was a refusal by the courts to enforce a landlord's lien on cotton raised in Arkansas, and sold in New Orleans.

³ *Lafayette v. Metcalf*, 29 Mo. App. 384; *Kanaga v. Taylor*, 7 O. St. 134; s. c. 70 Am. Dec. 62, and cases in first note to the preceding section.

⁴ In Georgia the mortgagee from another state is allowed six months after the removal of the property to that state, within which to record his mortgage there. If, however, he institutes in the courts there, within the six months, proceedings to foreclose his mortgage, such record is not necessary, even as against a *bona fide* purchaser. *Hubbard v. Andrews*, 76 Ga. 177; but if such proceedings are instituted after the six months, a purchaser will be protected, even though he buys *pendente lite*. *Douglass v. McCracken*, 52 Ga. 596. Where property mortgaged in another state is casually brought into Georgia, the mortgagee residing in such other state, a record of the mortgage in Georgia is not made necessary by such character of removal. *Peterson v. Kaigler*, 78 Ga. 464; s. c. 3 S. E. Repr. 655. Where such statute as to removal requires registry within six months as against creditors only, a

ity has, with the better reason, been denied as against creditors and purchasers without notice.¹ "It would be an extraordinary stretch of comity," said Justice Hall, of the Pennsylvania court, "that would induce a court here to hold that a Maryland chattel mortgage shall be made the means of defrauding our own citizens. Would it be reasonable to require that the purchaser should have first ascertained where this migratory doctor came from, and then have had the records of all counties in Maryland searched for chattel mortgages? * * * No people are bound to enforce a contract in contravention of their public law and policy. The comity extended to the *lex loci* must yield to the positive law and public interests of the place where the remedy is sought."² Constructive notice by registry does not extend beyond the territorial limits of the state wherein the record is made.³ It charges a subsequent purchaser, or creditor, with notice upon the theory that he has had reasonable opportunity of examining the records affecting the property.⁴ Obviously this reason would not hold good where the records are in a distant state and uncertain place. The registry laws are designed for the protection of creditors and purchasers, and the public policy that underlies them is violated whenever their protection is withdrawn for the sake of comity.⁵

failure to so register will not avail to protect a purchaser. *Beall v. Williamson*, 14 Ala. 55.

¹ Where property was brought by the mortgagor into Michigan and there seized and sold under execution against him, the title thereunder was held superior to that under a prior mortgage that had been duly recorded in the jurisdiction from which the property was brought. *Montgomery v. Wight*, 8 Mich. 143. And so held under the earlier cases in Vermont. *Woodward v. Gates*, 9 Vt. 358; *Skiff v. Solace*, 23 Vt. 279; and see *Harris v. Walworth*, 129 U. S. 355.

² *MacCabe v. Blymyer*, 9 Phila. 615, cited more fully in *Jones on Chat. Mort.*, §300; *Green v. Van Buskirk*, 5 Wall. 307; *Harris v. Walworth*, 129 U. S. 355.

³ *Crosby v. Huston*, 1 Tex. 203; *Baskin v. Vernon*, 74 Ga. 370.

⁴ *Wild v. Brooks*, 10 Minn. 50; *Acer v. Westcott*, 46 N. Y. 84; s. c. 7 Am. Rep. 355; *ante*, §4.

⁵ In Texas there is no registry provision relative to mortgaged property removed into the state, but the law of that state, like that of West Vir-

§268. Continued—Lex Situs Controls, When.

Where property is situated in a state other than that in which a conveyance of it is made, the *lex situs* controls, and the instrument must be executed, acknowledged and recorded in conformity with the law of the place where the property is at the time.¹ The theory that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns, wherever it may happen to be located; a fiction, however, which yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined, and where the laws and policy of the state where the property is located have prescribed a different rule of transfer from that of the state where the owner lives.² Each state has full jurisdiction

ginia, Wyoming and Virginia, requires of its own citizens that where mortgaged property is removed to another county, it shall be followed by another record of the mortgage in the new locality. Comity cannot properly require a state to extend to mortgagees in another state greater privileges than it accords to those within its own limits. "Nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or selfish policy * * * In carrying out the principle of comity care must be taken that the state inflicts no injury upon her own citizens, otherwise justice would be sacrificed to comity." Story on Conf. of Laws, §§390, 388; Harris v. Walworth, 129 U. S. 355; Olivier v. Townes, 2 Mart. (N. S.), 93; Denny v. Bennett, 128 U. S. 489; Green v. VanBuskirk, 7 Wall. 139; Hervey v. R. I. Works, 93 U. S. 664.

¹ Green v. VanBuskirk, 7 Wall. 139; s. c. 5 Wall. 307; Ames v. Warren, 76 Ind. 512; s. c. 40 Am. Rep. 258; Denny v. Faulkner, 22 Kan. 89; Clark v. Tarbell, 58 N. H. 88; Guillander v. Howell, 35 N. Y. 657; Hardaway v. Semmes, 38 Ala. 657.

² Harris v. Walworth, 129 U. S. 355; Ames v. Warren, *supra*; Clark v. Tarbell, 58 N. H. 88; Whart. Conf. Laws, §297; Story Conf. Laws, §379; Murray v. Charleston, 96 U. S. 432.

The fiction of law by which personal property, however bulky, is supposed to adhere to the person of its owner, is declared by Judge Elliott, in Ames v. Warren, *supra*, to produce strange incongruities and almost grotesque results; citing the authorities last above.

The *lex fori* determines and regulates the remedies upon a mortgage or other conveyance of personal property executed in another state or country; these being regulated and controlled exclusively by the law of the state to which the property has been removed. Ferguson v. Clifford, 37 N. H. 86; Chaffe v. Heyner, 31 La. Ann. 594.

over the personal as well as real property within its territory, and the laws of the state regulate and control its sale and transfer, and all rights that may be affected thereby.¹

§269. Actual Notice.

The doctrines of actual notice obtain with reference to personal property substantially as with relation to real estate;² the general rule being that one who purchases personal property with actual notice of a prior unregistered conveyance, or mortgage of it, takes subject to the rights conferred by such prior instrument.³ As to mortgages of personalty, the exceptions to the general rule as to actual notice are somewhat more numerous than in the case of real property; these exceptions resting upon the terms of the chattel mortgage acts, declaring an unfiled mortgage void as to third

¹ Harris v. Walworth, 129 U. S. 355; Clark v. Tarbell, *supra*.

² See *ante*, ch. IX, and §245. It is not deemed necessary here to discuss the application and limitations of the rule, except where there is a difference as to personal property.

³ The numerous cases nearly all relate to chattel mortgages. Brothers v. Mundell, 60 Tex. 246; Baldwin v. Crow (Ky.), 7 S. W. Repr. 146; Darland v. Levins (Wash. Ter.), 20 Pac. Repr. 309; Bacon v. Thompson, 60 Iowa, 285; Allen v. McCalla, 25 Iowa, 464; s. c. 96 Am. Dec. 64; Eaton v. Tuson, 145 Mass. 218; s. c. 13 N. E. Repr. 488; Gooding v. Riley, 50 N. H. 409; Steele v. Adams, 21 Ala. 534; Shuler v. Boutwell, 18 Hun. 171; Gregory v. Thomas, 20 Wend. 17; Williamson v. N. J. S. Ry. Co., 26 N. J. Eq. 398; Hudson v. Warner, 2 Har. & J. 415; McNeil v. Finnegan, 33 Minn. 375; s. c. 23 N. W. Repr. 540; Funk v. Paul, 64 Wis. 35; s. c. 24 N. W. Repr. 419; Fuller v. Paige, 26 Ill. 358; s. c. 79 Am. Dec. 379; People v. Hamilton, 17 Ill. App. 599; Doyle v. Stevens, 4 Mich. 87; Tiffany v. Warren, 37 Barb. 571; Coble v. Nonenmaker, 78 Pa. St. 501; McKee v. Mining Co., 8 Colo. 392, 395; Gildersleeve v. Landon, 73 N. Y. 709; Hulsizer v. Opdyke (N. J.), 13 Atl. Repr. 669; Paine v. Mason, 7 O. St. 199.

In Colorado it is expressly declared by statute that actual notice of an unrecorded chattel mortgage shall charge a subsequent purchaser or incumbrancer; Rev. Stats., §172; Crane v. Chandler, 3 Colo. 21; Gerow v. Castello, 11 Colo. 560; and in other states, as Tennessee, Texas, Virginia, West Virginia, North Carolina and Maryland, the statutes relating to the record of personal mortgages are, as to subsequent purchases in good faith, or without notice, in the same terms as the registry statutes pertaining to real property.

One is not a purchaser in good faith whose chattel mortgage recites the existence of a prior mortgage on the property. Tolbert v. Horton, 31 Minn. 518; s. c. 18 N. W. Repr. 647.

persons without qualification, or ineffectual to create any lien until recorded. Under these statutes actual notice of a prior unregistered chattel mortgage is of no effect.¹

§270. Actual Notice to Creditors.

In a number of states the chattel mortgage registry statutes make a distinction as to notice between creditors and subsequent purchasers, not found in the recording acts pertaining to real estate. Thus, in Texas, a conveyance of real estate is declared "void as to all creditors and subsequent purchasers for valuable consideration without notice," unless recorded; while it is declared that a chattel mortgage "shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers, mortgagees and lien holders in good faith," unless duly filed.² A purchaser in good faith must be without actual notice; but the qualification as to good faith in the latter statute does not by its terms apply to creditors, and as to them actual notice is of no avail, and will not prevent them, where they obtain a lien by levy of execution, or other writ, from being entitled to preference.³

§271. Affidavit of Good Faith.

The statutes of a number of the states provide that a chattel mortgage shall not be valid except as between the parties

¹ *Hughes v. Menifee*, 29 Mo. App. 192; *Rawlins v. Bean*, 80 Mo. 614; *Wilson v. Milligan*, 75 Mo. 41; *Bingham v. Jordan*, 1 Allen, 373; s. c. 79 Am. Dec. 750; *Howard v. Chase*, 104 Mass. 251; *Blatchford v. Boyden*, 122 Ill. 657, 668; s. c. 13 N. E. Repr. 801; *McDowell v. Stewart*, 83 Ill. 538; *Briggs v. Fleming*, 112 Ind. 313; s. c. 14 N. E. Repr. 86; *Moon v. Young*, 4 Biss. 128, 135; *Kennedy v. Shaw*, 38 Ind. 474; *Rich v. Roberts*, 48 Me. 548; *Watson v. Thompson*, 49 Ark. 83; s. c. 4 S. W. Repr. 62.

² Rev. Stats., §4332 (deeds); Sayles' Tex. Stats., §3190b (chattel mortgages).

³ *Overstreet v. Manning*, 67 Tex. 657; s. c. 4 S. W. Repr. 248; *Brothers v. Mundell*, 60 Tex. 240. For similar statutes and decisions, see *Sayre v. Hewes*, 32 N. J. Eq. 652, 656; *Williamson v. N. J. S. Ry. Co.*, 29 N. J. Eq. 336; *Farmer's Loan Co. v. Hendrickson*, 25 Barb. 484; *Tiffany v. Warren*, 37 Barb. 571; *Stevens v. Buffalo, etc., Ry. Co.*, 31 Barb. 590; Rev. Stats. of Ohio (1880), §§4150-4153.

to it, unless it be verified by an affidavit to the effect that it is taken in good faith, or that the consideration or liability therein is truly stated.¹ The affidavit must in all cases be indorsed upon or attached to the mortgage and recorded with it. In Maryland, it need state only that the consideration in the mortgage is true and *bona fide* as therein set forth.² Substantial compliance with the statute is sufficient,³ but without the affidavit, the record is ineffectual.⁴ A trust deed, not being technically a mortgage, does not require the affidavit, nor that it should be recorded as a mortgage.⁵ In California the mortgage must be accompanied by an affidavit of all the parties thereto, that it is made in good faith, and without any design to hinder, delay or defraud creditors.⁶ This does not require that the affidavit should be signed by the party making it;⁷ but where the statute provides that the parties shall make and subscribe the affidavit, writing their names in the body of the affidavit is not sufficient.⁸ In some states it is required

¹ Comp. Stats. Mont., §1538; Rev. Laws Vt., §1969; *Phillips v. Johnson*, 64 N. H. 393. Where the affidavit is insufficient, extrinsic evidence cannot be admitted to support or explain it. *Butte Hardware Co. v. Sullivan*, 7 Mont. 307; s. c. 16 Pac. Repr. 588, citing *Nesbit v. Worts*, 37 O. St. 382; *Blondy v. Benedict*, 42 O. St. 298.

² It may be made at any time before the mortgage is recorded. Rev. Code of Md. (1878), art. 44, §§35, 54.

³ *Stanhope v. Dodge*, 52 Md. 483; *Gardiner v. Parmalee*, 31 Ohio, 551; *Gilbert v. Vail*, 60 Vt. 261; s. c. 14 Atl. Repr. 542.

⁴ *Cockey v. Milne*, 16 Md. 200; *Nelson v. Hagerstown Bank*, 27 Md. 51.

⁵ "Once admit that the word 'mortgage' in this statute includes any other instrument than a purely technical mortgage * * * and it will be exceedingly difficult to say what deeds are and what are not within the act. It will be no easy task to define the dividing line. There are instruments that are mortgages only by equitable construction. A deed absolute on its face by mistake, if intended to be a mortgage, will be so declared by a court of equity; and I presume it will not be said that if such a deed is without the oath, it will be void under the act." *Eccleston, J.*, in *Charles v. Claggett*, 3 Md. 82.

⁶ Civ. Code, §2957. The law of Delaware, Arizona and Idaho is substantially the same. Laws of Del. 1877, ch. 477, §3; Comp. Laws Ariz. 1877, §3644.

⁷ *Ede v. Johnson*, 15 Cal. 53; and see *Deatherage v. Woods*, 37 Kan. 59; s. c. 14 Pac. Repr. 474.

⁸ *Stone v. Marvel*, 45 N. H. 481.

that the mortgagee, his agent or attorney, shall make the affidavit; in others, that it be made by both or all the parties thereto.¹ In Ohio, Vermont and New Hampshire the affidavit must verify the existence and good faith of the debt, and also, where the mortgage is given to indemnify the mortgagee against liability as surety for the mortgagor, or other liability assumed, the affidavit must set forth such liability, and that the mortgage was taken in good faith to indemnify against loss that may result therefrom.² Where the mortgage secures a debt, and also liability incurred, and the affidavit describes both obligations in the same way as debts due, it will be sufficient as to the debt, but the mortgage will be void so far as it was intended to secure the liability incurred.³

¹ By all the mortgagees: *Butte v. Sullivan*, 7 Mont. 307; s. c. 16 Pac. Repr. 588. In New Hampshire, Vermont, and California, it is required that the affidavit be made by the parties to the mortgage. *Lovell v. Osgood*, 60 N. H. 71. One member of a firm may make the affidavit on behalf of the firm, provided the affidavit identify him as a member of the firm. *Baker v. Power*, 7 Mont. 326; s. c. 16 Pac. Repr. 589; *Randall v. Baker*, 20 N. H. 335.

Where the mortgage is taken by a town to secure a debt due it, the affidavit on behalf of the town may be made by one of the select men. *Sumner v. Dalton*, 58 N. H. 295.

The affidavit must be made by each party; *Lovell v. Osgood*, 60 N. H. 71; and if made by an agent, it must show the absence of the principal. *McLeary, J.*, in *Leopold v. Silverman*, 7 Mont. 266; s. c. 16 Pac. Repr. 580, citing *Wiley v. Aultman*, 53 Wis. 560; s. c. 11 N. W. Repr. 32; *State v. Washoe*, 5 Neb. 320.

² *Gardiner v. Parmelee*, 31 Ohio, 551; *Hanes v. Tiffany*, 25 O. St. 549.

³ *Parker v. Morrison*, 46 N. H. 280; *Belknap v. Wendell*, 31 N. H. 92. Under the form of affidavit in New Hampshire, it has been held that a mortgage cannot be given to secure the debt of a third person. *Parker v. Morrison*, *supra*; nor can it be made to secure future claims. *Page v. Ordway*, 40 N. H. 253; but see as to later statutes, *Phillips v. Johnson*, 64 N. H. 393; Gen. Laws, ch. 137, §§6, 9, 11. An affidavit that "the mortgage is made for the purpose of securing the debt specified in the condition thereof," held sufficient where the condition showed that the mortgage was given to secure the mortgagee against liability as indorser for the mortgagor. *Gilbert v. Vail*, 60 Vt. 261; s. c. 14 Atl. Repr. 542.

§272. Recorder's Certificate.

In a few states the certificate of the recording officer is by statute made conclusive evidence of the fact that a mortgage or conveyance has been duly filed or recorded.¹ Where the statute has not given this effect to the certificate, it is usually held only *prima facie* evidence of those facts.² In Kansas, New Jersey, New York, New Mexico, Oregon, Texas, Wisconsin, and perhaps some other states, the statutes provide that a copy of a chattel mortgage, or of a copy thereof duly filed, including any affidavits annexed thereto in pursuance of the statute, certified by the clerk or recorder in whose office the same shall be filed, shall be evidence of the fact that such instrument, copy or affidavit, was received and filed according to the indorsement of the clerk thereon, but of no other fact.³ In some other states certified copies of chattel mortgages are to be received in evidence with the same force and effect as in case of deeds.

§273. Mortgages of Growing Crops.

Mortgages of growing crops, or crops thereafter to be grown, present, as specially pertaining to them, some questions as to the descriptions of the property, and as to the effect of the lien and record after the condition of the prop-

¹ *Jacobs v. Dennison*, 141 Mass. 117; s. c. 5 N. E. Repr. 526; *Anthony v. Butler*, 13 Pet. 423; *Fuller v. Cunningham*, 105 Mass. 442; *Ferguson v. Clifford*, 37 N. H. 86; *Head v. Goodwin*, 37 Me. 181; *Bullock v. Wallingford*, 55 N. H. 619; *Rev. Stats. Ohio*, §4143; *Horsley v. Garth*, 2 Gratt. 471; s. c. 44 Am. Dec. 293.

² *Johnson v. Burden*, 40 Vt. 567; s. c. 94 Am. Dec. 436; *Bartlett v. Boyd*, 34 Vt. 256; and see *Bigelow v. Topliff*, 25 Vt. 274; s. c. 60 Am. Dec. 264. Where the filing and indorsement of a chattel mortgage appears on the certified copy, a general certificate of true copy sufficiently verifies such filing and indorsement. *Smith v. Waggoner*, 50 Wis. 155; s. c. 6 N. W. Repr. 568. The officer's certificate of record on a deed cannot be contradicted by the testimony of a witness not in charge of the registry office, to the effect that no such record could be found. *Edwards v. Barwise*, 69 Tex. 84; s. c. 6 S. W. Repr. 677.

³ 2 *Sayles' Tex. Stats.*, §3190b, §3. Such certificate of record gives the copy no other statutory efficiency, and does not dispense with the necessity of proof of the execution of the instrument, nor the necessity of producing the original or accounting for its absence. *Boydston v. Morris*, 71 Tex. 697.

erty has been materially changed by its having been gathered and housed, or prepared for market.¹ A specific description of the property being in the nature of the case impossible, a very general description, if it be such as can be made certain by the aid of extrinsic evidence, is usually held sufficient. Thus, "all my crop of corn and cotton for the year 1884, in F. county, Ark.," has been held sufficiently definite to render the record of the mortgage constructive notice to third persons.² And so, "my entire crop of cotton and corn of the present year," without any other descriptive words, or statement of locality.³ But "all the crops raised by me in any part of Jones county for the term of three years," has been held too indefinite to charge third persons with notice of the mortgage.⁴

¹ In some instances the statutes provide that the lien of a chattel mortgage on a growing crop shall cease as against subsequent purchasers unless possession of such crops, when harvested, be delivered to the mortgagee. *Quiriague v. Dennis*, 24 Cal. 154; *Goodyear v. Williston*, 42 Cal. 11. A tortious removal of the crop by a third person does not affect the lien. *Wilson v. Prouty*, 70 Cal. 196; s. c. 11 Pac. Repr. 608; *Martin v. Thompson*, 63 Cal. 4. See *Lamson v. Moffatt*, 61 Wis. 153; s. c. 21 N. W. Repr. 62; *Cole v. Kerr*, 19 Neb. 553; s. c. 26 N. W. Repr. 598; and notes to *Gregg v. Sanford*, 24 Ill. 17; s. c. 76 Am. Dec. 725. Though an agricultural lien be not recorded within thirty days, it is good between the parties, and may be enforced. *Loyns v. Tedder*, 7 S. Car. 69.

² *Johnson v. Grissard*, 51 Ark. 410; s. c. 11 S. W. Repr. 585; 29 Cent. Law J. 44.

³ *Ellis v. Martin*, 60 Ala. 394; *Varnum v. State*, 78 Ala. 28. And so, "my entire crop of cotton and corn," parol evidence being admissible to show that the parties had reference to the crop to be raised by the mortgagor on the plantation, in the county, which he was then cultivating. *Smith v. Fields*, 79 Ala. 335; *Hamilton v. Maas*, 77 Ala. 283.

⁴ *Muir v. Blake*, 57 Iowa, 662; s. c. 11 N. W. Repr. 621. So, "all the grain, oats, wheat, flax and corn raised" on certain land, but failing to state the year or time in which the crops were, or were to be raised, held bad for uncertainty. *Barr v. Cannon*, 69 Iowa, 20; s. c. 28 N. W. Repr. 413; *Rountree v. Britt*, 94 N. C. 104. A mortgage of ten bales of each annual crop of cotton to be produced on certain land, is void as to third parties for uncertainty. *Dodds v. Neel*, 41 Ark. 70. So, "all of a crop of ten acres of cotton," to be grown in a forty acre field. *Krone v. Phelps*, 43 Ark. 350.

"My tobacco crop, to be grown this year on my own lands," held sufficient. *State v. Logan*, 100 N. C. 454; s. c. 6 S. E. Repr. 398; citing *Woodliff v. Harris*, 95 N. C. 311; *State v. Garriss*, 98 N. C. 733; s. c. 4 S.

§274. Continued—When Record Not Constructive Notice.

The court of Nebraska has recently held the record of a mortgage on growing grain not constructive notice to third parties after the grain had been gathered and lawfully placed in a crib or bin. "A mortgage of growing crops," said Maxwell, J., "does not necessarily imply a mortgage of the same grain gathered and placed in a granary or crib, at least so far as constructive notice to be derived from the filing of the mortgage is concerned. The lien as between the parties continues, no doubt, but our statutes do not favor secret liens, and this court has so declared in a number of cases. *Edminster v. Higgins*, 6 Neb. 265; *Rhea v. Reynolds*, 12 Neb. 133; 10 N. W. Repr. 549. A mortgage, therefore, of growing grain is not notice of a mortgage on grain in a crib or bin, when it has been lawfully placed there by the mortgagee, or by the mortgagor with his consent. If wrongfully or unlawfully removed, the rule would probably be different. * * * It is not the policy of the law to extend the doctrine of constructive notice to cases where the change in an article mortgaged, made with the consent of the mortgagee, will fail to put a purchaser upon inquiry as to a claim held by a lien on the property. Thus, a mortgage of clay in the bank would not be notice to a purchaser of brick manufactured from such clay; nor of wool growing upon sheep of a lien upon the cloth manufactured therefrom. If the cases supposed differ from the one at bar, it is only in degree. * * * The more

E. Repr. 633; and see also, *Rawlings v. Hunt*, 90 N. C. 270; *Spivey v. Grant*, 96 N. C. 214; s. c. 2 S. E. Repr. 45; *Goff v. Pope*, 83 N. C. 127; *Norris v. Hix*, 74 Iowa, 524; s. c. 38 N. W. Repr. 395; *McArthur v. Garman*, 71 Iowa, 34; s. c. 32 N. W. Repr. 14; *Cole v. Kerr*, 19 Neb. 553; s. c. 26 N. W. Repr. 598.

In some states a mortgage of crops thereafter to be raised conveys only an equitable title, and is not notice to third persons, nor good as against such third persons unless possession be taken before their rights attach. *Lamson v. Moffatt*, 61 Wis. 153; s. c. 21 N. W. Repr. 62; *Marks v. Robinson*, 82 Ala. 69; s. c. 2 South. Repr. 292. See also, *Leslie v. Hinson*, 83 Ala. 266; s. c. 3 South. Repr. 443; *Jackson v. Bain*, 74 Ala. 328; *Rees v. Coats*, 65 Ala. 256.

salutary rule, no doubt, is to require the mortgagee to look after his security, and if change is made in its character, to see that his mortgage shall impart notice to third parties.”¹ While this reasoning is sound, its application to a case where the only change in the property is such as is made in gathering and storing it, is hardly supported by the weight of authority. Thus, as against attaching creditors a mortgage upon a growing crop of oats was held to continue a lien upon them after they had been harvested, threshed and removed from the land;² and so, where assorted pickles were at the time of the mortgage in bulk and salt, and were afterwards “greened” and put into bottles and vinegar.³ So, as against a purchaser who bought in the usual course of trade, without actual notice, a mortgage of growing wheat which was afterwards, without the knowledge or consent of the mortgagee, harvested, threshed, removed and sold by the mortgagor, was held to charge constructive notice of a lien on the harvested grain.⁴ A purchaser, however, has been accorded protection where the sale of that portion of the crop purchased by him was necessary to enable the mortgagor to harvest the remainder.⁵

¹ *Gilliland v. Kendall* (Neb., 1889), 28 Cent. Law J. 543. See also, *Lamson v. Moffatt*, 61 Wis. 153; *Marks v. Robinson*, 82 Ala. 69.

² *Rider v. Edgar*, 54 Cal. 127; and see also, *Kimball v. Sattley*, 55 Vt. 285; s. c. 45 Am. Rep. 614.

³ *Crosby v. Baker*, 6 Allen (88 Mass.), 295. A mortgage of leather cut and prepared for the manufacture of shoes, has been held to cover shoes subsequently made therefrom by the mortgagor, as against attaching creditors. *Putman v. Cushing*, 10 Gray (76 Mass.), 334.

⁴ *Duke v. Strickland*, 43 Ind. 494; and see also, *Hackleman v. Goodman*, 75 Ind. 202; *Smith v. Jenks*, 1 Denio, 580; *Wilson v. Prouty*, 70 Cal. 196; s. c. 11 Pac. Repr. 608. Failure to specify the year in which the crops are to be grown vitiates the description. *Penning v. Jones*, 57 Iowa, 37; s. c. 10 N. W. Repr. 274.

As against third persons, the validity of mortgages of crops to be thereafter raised, and of property to be thereafter acquired, is denied in several states. *Lamson v. Moffatt*, 61 Wis. 153; *Marks v. Robinson*, 82 Ala. 69; *First Natl. Bk. v. Comfort*, 4 Dak. —; s. c. 28 N. W. Repr. 855; *Griffith v. Douglass*, 73 Me. 532; s. c. 40 Am. Rep. 359; *Loth v. Carty*, 85 Ky. 591; s. c. 4 S. W. Repr. 314.

⁵ *Etheridge v. Hilliard*, 100 N. C. 250.

§275. Conveyances and Mortgages of Vessels.

The statutes of the United States provide that no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless recorded in the office of the collector of customs where such vessel is registered or enrolled.¹ Where a transfer or mortgage of a vessel has not been recorded as required by this act, a subsequent purchaser or creditor of the person having the apparent legal title of record, if without actual notice, will be protected as against the real or equitable owner.² Recording is not necessary as against one having actual notice.³ The statute applies only to vessels of the United States, and not to one that has never been registered or enrolled at all under the laws of the United States. In such latter case a mortgage or other conveyance of the vessel must be recorded in conformity with the laws of the state where the vessel is at the time.⁴ Ships, or vessels of the United States, are the creations of

¹ Rev. Stats., §4192; Act of July 29, 1850. The statute provides for acknowledgment before a notary or other officer authorized as in case of deeds; Acts of March 3, 1865; also for certificates of discharge and cancellation of liens, and for the giving of certified copies, by the collector, of all material matters appearing on the record books. It exempts from record the lien by bottomry on any vessel created during her voyage by a loan of money or materials necessary to repair or enable her to prosecute the voyage. This exemption refers only to maritime liens, and not to those created by statute. *The Kate Hinchman*, 7 Biss. 238; *Bolton v. The J. L. Pendergast*, 30 Fed. Repr. 717; see *post*, §276; *Brig Atlantic*, Newb. 514; *Thorsen v. Schooner J. B. Martin*, 26 Wis. 488; *The Tonawanda*, 29 Fed. Repr. 877.

² *Hance v. Antone*, 1 Tex. Civ. App., §800; *Sloop Mary*, 1 Paine, 671; *The Romp*, *Olcott's Adm.* 196; *The Archer*, 15 Fed. Repr. 276. Where the apparent owner holds the title in trust, third persons without notice of the trust will be protected. *Atherton v. Phoenix Ins. Co.*, 109 Mass. 32.

³ *Hance v. Antone*, *supra*; *The John T. Moore*, 3 Woods, 61; *Moore v. Simonds*, 100 U. S. 145; *Merrick v. Avery*, 14 Ark. 370; *Best v. Staple*, 61 N. Y. 71.

⁴ *Veazie v. Somerby*, 5 Allen (87 Mass.), 280; *Foster v. Perkins*, 42 Me. 168; *Goodenow v. Dunn*, 21 Me. 86.

the legislation of congress, and are such as have been built in the United States, and belonging wholly to citizens thereof, and have been duly registered under her laws, or if coasting vessels, such as have been enrolled and licensed as such.¹ The record of a conveyance or lien elsewhere than in the collector's office at the home port of the vessel is of no effect. The temporary registry, when the owner acquires title to a vessel in a district other than that in which he resides, continues only until the vessel arrives at the home port to which she belongs, and which is thenceforth the place for recording under the statute, and not the place of her last registry or enrollment.² *Prima facie* the home port is the place of enrollment where, or nearest to which the owner, or if more than one owner, the managing owner, resides.³

¹ Act of Feb. 18, 1793, §1; *White's Bank v. Smith*, 7 Wall. 646; 23 Myer's Fed. Dec., §1413; *Stinson v. Minor*, 34 Ind. 89; *Best v. Staple*, *supra*; *Davidson v. Gorham*, 6 Cal. 343; *Perkins v. Emerson*, 59 Me. 319.

A pleasure yacht is not a vessel of the United States within the meaning of this recording act. *Veazie v. Somerby*, *supra*; nor is a canal boat or scow, though found upon a navigable river at the time it is attached. *Hicks v. Williams*, 17 Barb. 523. A steam dredge is a vessel within the meaning of the law as to maritime liens for supplies. *The Pioneer*, 30 Fed. Repr. 206.

A vessel though used wholly within the navigable waters of a single state, if enrolled, is within the provisions of the Federal statute requiring a mortgage of her to be recorded in the custom house. *Lawrence v. Hodges*, 92 N. C. 672; s. C. 53 Am. Rep. 436.

² *White's Bank v. Smith*, 7 Wall. 646; *Johnson v. Merrill*, 122 Mass. 153; *Hays v. Pacific, etc., Co.*, 17 How. 596; *Blanchard v. The Martha Washington*, 1 Cliff. 463; *The John T. Moore*, 3 Woods. 61.

Some earlier cases held that the place of record was in the district of the last registry, though not the home port of the vessel. *Potter v. Irish*, 10 Gray (76 Mass.), 416; *Chadwick v. Baker*, 54 Me. 9.

³ *The Ellen Holgate*, 30 Fed. Repr. 125. It is well settled that a vessel cannot have more than one home port, or be a domestic vessel in more than one state. *A fortiori* she may, if owned by residents of different states, be a foreign vessel in the port of a state wherein certain of her owners reside. *Id.* The home port need not be a port of entry. *The Lotus No. 2*, 26 Fed. Repr. 637. Registry of a vessel is only *prima facie* evidence of ownership. *Bradbury v. Johnson*, 41 Me. 582; s. C. 66 Am. Dec. 264.

§276. Continued—Federal and State Statutes.

The statutes of the United States as to recording exclude all state legislation upon the subject, whether prior or subsequent to the Federal statute; and a mortgage of a registered vessel need not be recorded in pursuance of any state statute in order to give it preference over a subsequent purchaser or mortgagee, if it be duly recorded under the Federal law.¹ So, although before a vessel is registered or enrolled, a mortgage of it will be valid if recorded in conformity with the state law, yet after registry or enrollment of the vessel, such registry ceases to be effectual, and the mortgage must be recorded as required by the laws of the United States.² Some of the state cases, however, are not in harmony with this construction;³ and among both the state and Federal decisions, there is some conflict as to the character of special liens that are entitled to preference over a lien recorded under the Federal statute.⁴ Strictly mari

¹ *Aldrich v. Ætna Co.*, 8 Wall. 491; *White's Bank v. Smith*, 7 Wall. 646; s. c. 23 Myer's Fed. Dec. §1412. For prior cases not in accordance with this view, see *Shaw v. Chandler*, 36 Miss. 296; *Cunningham v. Tucker*, 14 Fla. 251; *Folger v. Weber*, 16 Hun. 512; *Robinson v. Rice*, 3 Mich. 235; *Thompson v. Van Vetchen*, 5 Abb. Pr. 458; *Fontaine v. Beers*, 19 Ala. 722; *The Grace Greenwood*, 2 Biss. 131; *Thorsen v. The Schooner Martin*, 26 Wis. 488.

² "To hold otherwise would go far to defeat the very object which the registry laws of the United States were intended to secure." *Perkins v. Emerson*, 59 Me. 319.

³ See *Foster v. Perkins*, 42 Me. 168. In Indiana it was held that the record of a mortgage, made under state law prior to the registry or enrollment of the vessel, remained effective as notice after enrollment under the Federal statute. *Stinson v. Minor*, 34 Ind. 89.

Liens given by state laws for supplies furnished a domestic vessel take precedence of a mortgage subsequently recorded pursuant to the act of congress. *The Harrison*, 2 Abb. (U. S. Dist. of Cal.), 74; *The Wm. T. Graves*, 14 Blatchf. 189.

⁴ The recording act of the U. S. held to affect only rights acquired under written instruments, and not to operate to defeat liens for supplies acquired under state laws. *Thorsen v. The Schooner J. B. Martin*, 26 Wis. 488.

§4192 of the Rev. Statutes, as to recording of mortgages, does not declare what effect shall be given to the mortgage with respect to other liens. *The Favorite*, 3 Saw. 405. By permitting the mortgagors to retain possession, the mortgagee assents to such liens as may accrue under the latter's management, incidental to the ordinary business of

time liens are superior to a mortgage, though it be duly recorded under either state or Federal statute.¹ But while the act of congress excludes state legislation imposing additional requisites in the recording of conveyances and liens affecting vessels, it is nevertheless competent for the states to create liens which will take preference to the lien of a mortgage recorded pursuant to the Federal statute, since the latter does not declare what effect shall be given to recorded mortgages with respect to other liens.² The states may therefore determine the rank of liens upon domestic vessels, and may give liens for labor performed and materials used in their construction and repair priority over a mortgage, whether the mortgage be recorded under the state law be-

the vessel. *The Live Oak*, 30 Fed. Repr. 78; *The Charlotte Vanderbilt*, 19 Fed. Repr. 219; *Scott v. Delahunt*, 65 N. Y. 128; s. c. 3 Lans. 372.

¹ *Baldwin v. The Bradish Johnson*, 3 Woods, 582; *The Tonawanda*, 29 Fed. Repr. 877; *The Feronia*, 2 Adm. & E. 65.

A bond in the nature of a bottomry bond, but invalid as such, in order to be effectual against third parties as a mortgage, must be recorded. *Leland v. The Medora*, 2 Woodb. & M. 92; *Greeley v. Smith*, 3 *Id.* 236; and see *Hurry v. Hurry*, 2 Wash. 145.

A bill of sale is not necessary to transfer the title to a vessel. *The Amelie*, 6 Wall. 18; but the want of it raises a strong presumption that no sale took place. *The Conception*, 6 Wheat. 235; and the fact that a bill of sale was recorded, and the ship re-enrolled and insured in the buyer's name, and that neither note nor bond was taken by him, will not overcome positive testimony showing that it was in fact a mortgage, and intended as a mere security. *Morgan v. Shinn*, 15 Wall. 105; s. c. 23 Myer's Fed. Dec., §1414.

Under the New York state law, filing a chattel mortgage on a vessel does not continue to charge notice unless the owner continues to reside in the state. *Thomas v. The Kosciusko*, 11 N. Y. Leg. Obs. 38. As to state liens and jurisdiction of state courts, see *Archibald v. Citizen's Bk.*, 64 Miss. 523; s. c. 1 South. Repr. 739; *State v. Voorhies* (La.), 2 South. Repr. 37.

² *The Wm. T. Graves*, 14 Blatchf. 189; *The Favorite*, 3 Saw. 405. Where the claim is maritime in its nature, courts of admiralty will enforce liens given by the local law, by process *in rem*, and where the claim is not maritime, will recognize the lien in the distribution of proceeds. *The Wm. T. Graves*, *supra*; *Weaver v. The S. G. Owens*, 1 Wall., Jr., 359; *The Circassian*, 11 Blatchf. 472; and other cases cited in 1 Jones Chat. Mort., §536, to which I am indebted for much of the matter in this section.

fore the vessel is registered as a vessel of the United States, or be recorded under the Federal law.¹

¹ Jones v. Keen, 115 Mass. 170; The Granite State, 1 Sprague, 277; The City of Tawas, 3 Fed. Repr. 170; The Wm. T. Graves, 8 Ben. 568; Thorsen v. The Schooner Martin, 26 Wis. 488; The Norfolk & Union, 2 Hughes, 123; The Hiawatha, 5 Saw. 160; Reeder v. The George's Creek, 3 Hughes, 584.

A bill of sale of a canal boat, regarded as a chattel mortgage, unless duly filed, or possession be taken, is not merely presumptively fraudulent, but absolutely void, both under the provisions of Rev. Stats. N. Y. relating to chattel mortgages, and under Laws N. Y., 1864, c. 412, §§1, 2, requiring chattel mortgages on boats navigating the canals to be filed in the office of the auditor of the canal department. Keller v. Paine, 107 N. Y. 83; s. c. 13 N. E. Repr. 635.

PREFATORY NOTE TO CHAPTER 11.

In the following chapter a brief compilation of the principal statutory provisions of each state relating to registry is presented. Care has been taken to preserve as nearly as possible the distinctive phraseology and exact language of the statute, more especially in the important clauses affecting the rights of creditors and subsequent purchasers. The several sections are annotated with a fair proportion of leading cases, for the reason that such a grouping of decisions is often of great convenience when the law of a given state is to be examined. Neither the statutes nor the decisions, however, can be given in this connection as fully as might be desired without swelling the present work to unreasonable proportions.

Forms of certificates of acknowledgment and proof are given as nearly as may be in exact accordance with the law of each state; and these forms, together with statutory matter, and notes of decisions, relating to officers, double certificates, identity, witnesses, seals, etc., it is hoped will render the work useful not only to attorneys and abstracters in examining or passing upon title, but also to all officers authorized to take acknowledgments or issue certificates relating thereto. Usually only the form of certificate of joint acknowledgment is given, but as this form contains all the statutory phraseology appropriate to a single acknowledgment, the intelligent officer will experience but little if any difficulty in properly drafting the certificate of single acknowledgment by reference to the forms herein contained.

CHAPTER 11.

STATUTORY PROVISIONS.

§§277-283. Alabama.	§§385-389. Mississippi.
284-288. Arizona.	390-395. Missouri.
289-293a. Arkansas.	396-400. Montana.
294-298. California.	401-405. Nebraska.
299-301. Colorado.	406-410. Nevada.
302, 303. Connecticut.	411-415. New Hampshire.
304-308. Dakota, North and South.	416-421. New Jersey.
309-311. Delaware.	422-426. New Mexico.
312-316. District of Columbia.	427-431. New York.
317-321. Florida.	432-436. North Carolina.
322-328. Georgia.	437-442. Ohio.
329-333. Idaho Territory.	443-448. Oregon.
334-337. Illinois.	449-453. Pennsylvania.
338-342. Indiana.	455-459. Rhode Island.
343-346. Iowa.	460-464. South Carolina.
347-351. Kansas.	465-470. Tennessee.
352-356. Kentucky.	471-476. Texas.
357-360. Louisiana.	477-480. Utah Territory.
361-364. Maine.	481-484. Vermont.
365-369. Maryland.	485-488. Virginia.
370-374. Massachusetts.	489-493. Washington.
375-379. Michigan.	494-498. West Virginia.
380-384. Minnesota.	499-503. Wisconsin.
	504-506. Wyoming Territory.

ALABAMA.

§277. Effect and Time of Record.

Conveyances of unconditional estates and mortgages, or instruments in the nature of mortgages, of real estate, to secure any debt created at the date thereof, are void as to the purchasers for a valuable consideration, mortgagees, and judgment creditors, having no notice thereof, unless recorded within thirty days from their date in the office of the judge of probate for the county where the land lies.

All other conveyances, mortgages or deeds of trust to secure any debts other than specified above, are inoperative and void as to purchasers for a valuable consideration, mortgagees and judgment creditors without notice, unless recorded before the accrual of the rights of such purchasers, mortgagees and creditors.¹

The conveyance is operative as a record from the day on which it is delivered to the judge.² Recording in the proper office of any deed or conveyance of property which may be legally admitted to record operates as notice of such instrument without any acknowledgment or probate.³ Powers of attorney to convey property may be proved or acknowledged in the same manner, and must be received as evidence to the same extent as conveyances.

Code 1886, §§1810, 1811; Code of Ala., §2166; Rev. Code, §1557; *Munroe v. Hamilton*, 62 Ala. 227; *LeGrand v. Eufala Bk.*, 81 Ala. 123; s. c. 6 Am. St. Rep. 140; 1 South. Repr. 460; *Fouche v. Swan*, 80 Ala. 153; *Dolin v. Gardner*, 15 Ala. 758; *Betz v. Mulin*, 62 Ala. 365; *Hendon v. White*, 52 Ala. 597; *Boyd v. Beck*, 29 Ala. 703; *Smith v. Bk. of Mobile*, 21 Ala. 125. Actual notice is effectual. *Tompkins v. Henderson*, 83 Ala. 391; s. c. 3 South. Repr. 774; *Fenno v. Sayre*, 3 Ala. 458; *Nelson v. Dunn*, 15 Ala. 501; *Lindsey v. Veasey*, 62 Ala. 421. Possession is notice. *Pique v. Arendale*, 71 Ala. 91; *McCarthy v. Nicrosi*, 72 Ala. 232.

² Code 1886, §1793; Rev. Code, §1539; Code of Ala., §2148; *Leslie v. Hinson*, 83 Ala. 266; *Whitfield v. Ridley*, 78 Ala. 99; *Sweeney v. Bixler*, 69 Ala. 539; *Center v. Bank*, 22 Ala. 743; *Hardaway v. Semmes*, 38 Ala. 657; *Pollard v. Cocke*, 19 Ala. 188; *DeVandall v. Hamilton*, 27 Ala. 156; *Wells v. Morrow*, 38 Ala. 125; *Fash v. Raviesies*, 32 Ala. 451.

³ Code 1886, §1797; Rev. Code, §1543; Code of Ala. §2163; *Tranum v. Wilkerson*, 81 Ala. 408; *Bickley v. Keenan*, 60 Ala. 293; *Merritt v. Phoenix*, 48 Ala. 87. All instruments purporting on their face to be under seal are taken as sealed instruments. Code of Ala., §2194.

§278. Mortgages and Trust Deeds should be recorded at once, unless given to secure a debt created at the date thereof, in which case they may be recorded with rights of priority at any time within thirty days.¹ A mortgage is discharged of record by an entry of satisfaction made by the mortgagee upon the margin of the record. Such entry must be made within three months after written request,

under penalty of two hundred dollars.² Where there is a partial discharge of a debt secured by a mortgage, if the person receiving the payment fail, for thirty days after he has been requested to mark the partial satisfaction of the instrument on the record, to do so, he forfeits \$200.00.³

¹ Code 1886, §1797; Code of Ala., §2166; *Wood v. Lake*, 62 Ala. 489; *Andrews v. Burns*, 11 Ala. 691; *Coster v. Bk. of Georgia*, 24 Ala. 37; *De Vendal v. Malone*, 25 Ala. 272; *Mims v. Mims*, 35 Ala. 23; *Cook v. Parham*, 63 Ala. 450; *Magee v. Carpenter*, 4 Ala. 469; *Walker v. Miller*, 11 Ala. 1081.

² Code 1886, §1869; Laws 1880, 1881, p. 32; Code 1876, §§2222, 2223; *Jordan v. Mann*, 57 Ala. 595; *Boutwell v. Steiner*, 84 Ala. 307; s. c. 5 Am. St. Rep. 375; 4 South. Repr. 184. The payment of a mortgage debt, whether the mortgage is of real or personal property, divests the title passing by the mortgage. Code 1886, §1870.

³ Code 1886, §1868.

§279. Chattel Mortgages are inoperative and void as against creditors and purchasers without notice until recorded, unless the property is brought into this state subject to the incumbrance, in which case they must be registered within four months; if the property is removed to a county other than that in which the grantor resides, the mortgage must be recorded in such other county within six months from the removal. They must be recorded in the county where the grantor resides, and also in the county where the property is at the time of the conveyance.¹ A defeasance of a chattel conveyance absolute in terms must be recorded, or the defeasance is void as to creditors and purchasers from the grantee without notice.² The term personal property does not include choses in action.

¹ Code 1886, §1814; Rev. Code, §1561; Code of Ala., §2170; Rev. Code, §1553; Code of Ala. §2162; *Hardaway v. Semmes*, 23 Ala. 657; *Bickley v. Keenan*, 60 Ala. 293; *Heflin v. Slay*, 78 Ala. 180; *Boyd v. Beck*, 29 Ala. 703; *Wilkerson v. King*, 81 Ala. 156; *Beall v. Williamson*, 14 Ala. 55.

See as to mortgages of crops, *Smith v. Fields*, 79 Ala. 335; *Marks v. Robinson*, 82 Ala. 69; s. c. 2 South. Repr. 292; *ante*, §273; *Hamilton v. Maas*, 77 Ala. 283; *Leslie v. Hinson*, 83 Ala. 266; s. c. 3 South. Repr. 443; *Jackson v. Bain*, 74 Ala. 328; *Rees v. Coats*, 65 Ala. 256. No re-

newal of chattel mortgages is necessary. They are now required to be in writing and signed. Laws 1884-1885, p. 93.

As to personal property; Robinson v. Levi, 81 Ala. 134; Fairbanks v. Eureka Co., 67 Ala. 109; Weaver v. Lapsley, 42 Ala. 601; s. c. 94 Am. Dec. 671; Munroe v. Hamilton, 60 Ala. 227; Stewart v. Kirkland, 19 Ala. 162.

² Code 1886, §1815.

Conditional sales of railroad equipment and rolling stock, where the vendor reserves title, and the purchaser obtains possession, are void against judgment creditors of the purchaser without notice, or purchasers from him for value without notice, unless in writing, and recorded within three months after the making thereof, in the office of the judge of probate of the county in which such corporation may have its principal office or place of business; and if it has not in the state a principal office or place of business, then in the office of the secretary of state. Certified copies of such contracts, duly acknowledged and recorded, may be given in evidence without proof of the execution of the original. Code 1886, §§1821, 1822.

§280. Acknowledgments within the state may be taken by judges of the Supreme and Circuit Court and their clerks, chancellors and registers in chancery, probate judges, justices of the peace and notaries.

Without the state and within the United States, by judges and clerks of any Federal court, judges of any court of record in any state, notaries public, and commissioners of deeds appointed for Alabama.

Without the United States by the judge of any court of record, mayor or chief magistrate of any city, town, borough or county, notaries public, or by any diplomatic, consular or commercial agent of the United States.¹

¹ Code 1886, §§1799, 1800; Code of Ala., §§2155, 2156; Webb v. Mullins, 78 Ala. 111.

§281. Certificate of Acknowledgment.

The general form of certificate is as follows:

THE STATE OF }
..... COUNTY. }

I (name and style of officer) hereby certify that John Smith and Mary Smith, his wife, whose names are signed to the foregoing conveyance and who are known to me,

acknowledge before me on this day that being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand this day of,
A. D. 18...

(Signature and title.)¹

¹ Code 1886, §1802; Rev. Code, §1548; *Carter v. Chandrain*, 21 Ala. 72; *Hobson v. Kissam*, 8 Ala. 357; *Rogers v. Adams*, 66 Ala. 600; *Webb v. Mullins*, 78 Ala. 111; *Dugger v. Collins*, 69 Ala. 324; *Shelton v. Aultman*, 82 Ala. 315. If the grantor is unknown, his identity may be established by proof satisfactory to the officer.

§282. Acknowledgment of Married Women.

The wife may relinquish dower by joining with the husband in a conveyance attested by two witnesses, or acknowledged before an authorized officer; or subsequent to a conveyance by the husband, by an instrument in writing executed or acknowledged by her as above.

The wife has full legal capacity to contract in writing as if sole, with the assent of the husband expressed in writing; but he must join in her conveyances. If the husband is *non compos mentis*, or abandons his wife, or is a non-resident of the state, or is a convict serving two years or more, the wife can convey as if sole.¹

Separate examination is required only to conveyances of the exempted homestead. Following is the form of certificate in such case:

STATE OF }
.....COUNTY. }

I (name and title of officer) hereby certify that on the day of, 18.., came before me the within named Mary Smith, known, or made known, to me to be the wife of the within named John Smith, who being by me examined separate and apart from her husband touching her signature to the within, acknowledged

that she signed the same of her own free will and accord and without fear, constraint or threats on the part of her husband. In witness hereof, I hereunto set my hand, this the day of, 18...

(Signature and title.)²

¹ Code 1886, §§2346-2348.

² Code 1886, §2508; *Homer v. Schonfield*, 84 Ala. 313; *Gates v. Heister*, 81 Ala. 357; *Smith v. McGuire*, 67 Ala. 34; *Alabama v. Boykin*, 38 Ala. 510; *Boykin v. Rain*, 28 Ala. 332; s. c. 65 Am. Dec. 349; *Rooney v. Michael*, 84 Ala. 585; s. c. 4 South. Repr. 421; *Pacific Co. v. Anglin*, 82 Ala. 492; s. c. 1 South. Repr. 852; *Cahall v. Mut. Ass'n*, 61 Ala. 232; *Beene v. Randall*, 23 Ala. 514; *Dugger v. Collins*, 69 Ala. 324.

§283. Witnesses.

Conveyances of land must be attested by one witness, or if the grantor cannot write, by two witnesses who must write their names as witnesses. Acknowledgment dispenses with the necessity of witnesses. Relinquishments of dower formerly required two witnesses, who might prove the signature of the wife; but this provision has been repealed.¹ Deeds may be proved as well as acknowledged, but if not acknowledged and not attested by subscribing witnesses, they are ineffectual to transfer the title to land.² The certificate of proof by a subscribing witness is as follows:

THE STATE OF }
..... COUNTY. } ss.

I (name and style of officer) hereby certify that....., a subscribing witness to the foregoing conveyance, known to me, appeared before me this day, and being sworn stated that, the grantor in the conveyance, voluntarily executed the same in his presence, and in the presence of the other subscribing witness, on the day the same bears date; that he attested the same in the presence of the grantor and of the other witness, and that such other witness subscribed his name as a witness in his presence.

Given under my hand this the day of,
A. D. 18... (Signature and title.)³

¹ Rev. Code, §2373; Code of Ala., §2707.

² Code 1886, §1789; Code of Ala., §§2145, 2146; Bank v. Jones, 59 Ala. 123; Hendon v. White, 52 Ala. 597; Lord v. Folmar, 57 Ala. 615; Stultz v. Kohn, 64 Ala. 186.

³ Code 1886, §1803; Revised Code, §1549; Clement v. Pearce, 63 Ala. 284; Coleman v. State, 79 Ala. 49; Fipp v. McGehee, 5 Port. 413; Parsons v. Boyd, 20 Ala. 112; Harbinson v. Harrell, 19 Ala. 753; Dolin v. Gordon, 15 Ala. 758. Handwriting, Jones v. Hough, 77 Ala. 437.

There is no special law regulating the execution of conveyances by corporations. This depends altogether on the act of incorporation.

ARIZONA TERRITORY.

§284. Effect of the Record.

A conveyance of real estate, of inheritance, freehold, or for a term of more than one year, shall not be good and effectual against a purchaser in good faith, without notice thereof and for valuable consideration, nor against any creditor, unless such conveyance be acknowledged by the party who shall have signed and delivered it, or proved, in the manner required by law, and before some officer authorized by law to take such acknowledgment or proof, and be filed for record with the recorder of the county in which the land, or a part thereof, is situated.¹ Powers of attorney are to be recorded as other conveyances.² Conveyances are notice from the date of filing.³

¹ Revised Statutes (1887), title XI, §§1, 3.

² Rev. Stats., title LV, §37.

³ Rev. Stats., title LV, §41.

§285. Acknowledgment.

The acknowledgment or proof of an instrument of writing for record may be made within this territory before a clerk of a court having a seal, a notary public, county recorder or justice of the peace.

Without this territory, but within the United States or their territories, before a clerk of some court of record having a seal, commissioner of deeds duly appointed under the laws of this territory, or a notary public.

In foreign countries, before any consul, commercial agent, deputy consul or consular agent of the United States, resident in the county where the proof or acknowledgment is made.¹

The identity of the person making such acknowledgment must be known or proved to the officer, which shall be noted in the certificate.²

The certificate of acknowledgment must be substantially as follows:

TERRITORY OF..... }
COUNTY OF..... }

Before me..... (name and character of the officer), on this day personally appeared....., known to me (or proved to me on the oath of.....), to be the person whose name is subscribed to the foregoing

instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this.....day of.....A.

D.....

[SEAL.]³

¹ Rev. Stats. (1887), title LV, §§8-10.

² Rev. Stats., title LV, §12.

³ Rev. Stats., title LV, §15.

§286. Married Women.

Married women of the age of seventeen years or upwards may convey and transfer lands held by them in their own right, without being joined by the husband, as fully and perfectly as they might do if unmarried.¹

The homestead shall not be sold and conveyed by the owner, if a married man, without the consent of the wife.

The certificate of acknowledgment to any instrument purporting to convey the homestead must be substantially in the following form:

THE TERRITORY OF..... }
COUNTY OF..... }

Before me..... (name and character of officer), on this day personally appeared....., wife of....., known to me (or proved to me on oath of.....), to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said....., acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office, this.....day of.....A.

D.....

[SEAL.]²

The certificate of the officer, where the execution is proved by a witness, must be substantially as follows:

THE TERRITORY OF..... }
COUNTY OF..... }

Before me..... (insert the name and character of the officer), on this day personally appeared....., known to me (or proved to me on the oath of.....), to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me stated on oath that he saw....., the grantor or person who executed the foregoing instrument, subscribe the same (or that the grantor or person who executed such instrument of writing acknowledged in his presence that he had executed the same for the purposes and consideration therein expressed), and that he had signed the same as a witness at the request of the grantor (or person who executed the same.)

Given under my hand and seal of office, this.....day of....., A.
D.....

[SEAL.]³

¹ Rev. Stats. (1887), title LV, §13. *Miller v. Fish*, 1 *Ariz.* 232, 243.

² Rev. Stats., title LV, §15.

³ Rev. Stats., title LV, §18.

§287. Mortgages, Real and Chattel.

Any mortgage may be discharged by an entry on the margin of the record thereof or by a certificate of release duly acknowledged.¹ Continued change of possession of personal property necessary as against creditors, subsequent purchasers, and mortgagees or lien holders in good faith, and filing in office of county recorder, where the property is then situated, and if the mortgagor, or person making the same be a resident of this territory, then it shall also be recorded in the county of which he shall at the time be a resident.²

Deeds of trust, mortgages and judgments, or other instruments of writing intended to create a lien, shall be recorded in a separate book from deeds or other conveyances.³

¹ Rev. Stats. (1887), title XLII, §§3, 4.

² Rev. Stats., title XLII, §§8, 14.

³ Rev. Stats., title LV, §6.

§288. Witnesses.

The execution of an instrument may be established for record by proof of the handwriting of the grantor and of at least one of the subscribing witnesses, when the grantor and all the subscribing witnesses are dead, or non-residents of this territory, or their residence is unknown to the party desiring the proof, and cannot be ascertained, or when the subscribing witnesses become incompetent, through insanity, conviction of felony or otherwise; or when all the subscribing witnesses are dead, non-residents, residence unknown or are incompetent, and the grantor in such instrument refuses to acknowledge the execution of the same for record.¹

¹ Rev. Stats. (1887), title LV, §19.

ARKANSAS.

§289. Effect of Record.

No deed, bond or instrument of writing for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof, or against any creditor of the person executing such deed, bond or instrument, obtaining a judgment or decree which by law may be a lien upon such real estate, unless such deed, bond or instrument, duly executed and acknowledged or proved as is or may be required by law, shall be filed for record in the office of the clerk and *ex-officio* recorder of the county where such real estate may be situated.¹

Instruments are notice from the time of being filed for record.² The statute places powers of attorney and revocations thereof within the registry act.³

¹ Digest of Ark. (1884), ch. 27, §671; *Birnie v. Main*, 29 Ark. 591; *Brown v. Hanauer*, 48 Ark. 277; *Case v. Hargadine*, 43 Ark. 144; *Gaines v. Saunders*, 7 S. W. Repr. 301; *Byers v. Engles*, 16 Ark. 543; *Hamilton v. Fowlkes*, 16 Ark. 340.

Actual notice is effectual. *Simpson v. Montgomery*, 25 Ark. 365; S. C. 99 Am. Dec. 228; *Fargason v. Edrington*, 49 Ark. 207; S. C. 4 S. W. Repr. 763; *Stidham v. Mathews*, 20 Ark. 650; *Holman v. Patterson's Heirs*, 29 Ark. 357.

² Digest, §670; §§5560-5564; *Oats v. Walls*, 28 Ark. 244.

³ Dig., §§661-663; *Carnall v. Duval*, 22 Ark. 136. As to creditors: *Johnson v. Graves*, 27 Ark. 557; *Turner v. Watkins*, 31 Ark. 429; *Bridgeford v. Adams*, 45 Ark. 136.

§290. Mortgages.

Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office, and not before; which filing shall be notice to all persons of its existence.¹ A mortgage not filed, or recorded on a bad acknowledgment, is not good against a subsequent purchaser having actual notice of it.² The statute provides that satisfaction of a mortgage may be entered on the margin of the record.³

The mortgaged property must be appraised before sale, and must bring two-thirds of its appraised value.⁴

¹ Dig., §4742; *Dodd v. Parker*, 40 Ark. 526; *Jacoway v. Gault*, 20 Ark. 190; s. c. 73 Am. Dec. 494.

² *Connor v. Abbott*, 35 Ark. 365; *Fry v. Martin*, 33 Ark. 203.

³ Dig., §4745.

⁴ Dig., §§4759-4762.

§291. Acknowledgment may be made within the state before the Supreme or Circuit Court or any judge or clerk thereof, or a justice of the peace or notary public, or the clerk of any court of record.

Within the United States and without the state, before any court of the United States or any other state having a seal, or before the clerk thereof, or notary public, or mayor or chief officer of any city or town having a seal, or a commissioner of deeds for Arkansas.

In foreign countries, before any court of any state, kingdom or empire having a seal, or the mayor or chief officer of any city or town having an official seal, or before any officer of any foreign country who by its laws is authorized to take probate of the conveyance of real estate of his own country, having an official seal.¹

Where the grantor or witness making the proof is not known to the officer, he must take proof of identity. The officer must use his seal. The certificate of acknowledgment is not conclusive.² The form for single acknowledgment is as follows:

THE STATE OF..... }
COUNTY OF..... }

Be it remembered that on this day came before me the undersigned (name and title of officer), within and for the county aforesaid, duly commissioned and acting, John Smith, to me well known as the grantor in the foregoing deed, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth.

Witness my hand and seal as such (title of official), this
.....day of.....18..

(Signature and title of officer.)³

¹ Dig., §651; *Smith v. Van Gilder*, 26 Ark. 527.

² Dig., §655; *Little v. Dodge*, 32 Ark. 453; *Biscoe v. Bird*, 15 Ark. 655; *Clapp v. Halliday*, 48 Ark. 259.

³ Dig., §656. The omission of either "consideration" or "purposes" will vitiate the acknowledgment. *Jacoway v. Gault*, 20 Ark. 190; *Little v. Dodge*, 32 Ark. 453; *Magness v. Arnold*, 31 Ark. 103; *Clapp v. Halliday*, 48 Ark. 259.

§292. Married Women.

Privy examination of the wife is required, but not an explanation of the instrument. The husband must join in a conveyance of the wife's lands, if the lands were acquired before Oct. 13, 1874. If acquired since that date, she can convey either as a single person, or in the statutory form of conveyances by married women.¹ The form of joint certificate to a deed by husband and wife conveying lands of the husband, after stating the acknowledgment of the husband, as in the form already given, proceeds thus:

And on the same day also voluntarily appeared before me Mary Smith, wife of the said John Smith, to me well known as the person signing the deed, and in the absence of her said husband declared that she had of her own free will signed and sealed the relinquishment of dower in the foregoing deed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband. Witness my hand and seal (etc.).

If the conveyance is of lands of the wife, the certificate reads, "executed the same for the purposes," etc., instead of "signed and sealed the relinquishment of dower in the foregoing deed for the purposes," etc.² The statute provides for scheduling the separate property of married women, and a failure to record such schedule leaves the

burden of proof on the wife to show the character in which such property is held.³

¹ Const. art. XIV, §7; *Criscoe v. Hambrick*, 47 Ark. 235; s. c. 1 S. W. Repr. 150; *McGehee v. McKenzie*, 43 Ark. 156; *Stone v. Stone*, 43 Ark. 160; *Shryock v. Cannon*, 39 Ark. 434.

² Dig., §659; *Stilwell v. Adams*, 29 Ark. 346; *Tubbs v. Gatewood*, 26 Ark. 128; *Donahue v. Mills*, 41 Ark. 421; *Mickell v. Gardner*, *Id.* 491; *Chaffee v. Oliver*, 39 Ark. 531; *Johnson v. Richardson*, 44 Ark. 365; *Johnson v. Parker*, 11 S. W. Repr. 681.

³ Mansfield's Dig., §§4634-4636.

§293. Chattel Mortgages and deeds of trust of personal property may be filed and deposited in the recorder's office of the county in which the mortgagor lives, to be there kept for inspection. They are liens from the time of filing and are notice without further record, except indexing, for the space of one year.¹ They are void as against third persons after that time, unless within thirty days next preceding the expiration of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee therein at the time last aforesaid, or the amount of money yet due and unpaid thereon, which affidavit must be attached to and filed with the instrument or copy on file to which it relates. This affidavit is also to be noted in the index book. In the absence of stipulations to the contrary, the mortgagee of personal property has the legal title thereto and the right of possession.² The statute, however, does not forbid the mortgagor to remain in possession, and this he usually does until breach of condition; but in such case, if the mortgage gives him also a power of disposition, it is void.

Chattel mortgages may also be recorded as mortgages of real estate and with like effect.

¹ Mansfield's Dig., §§4742-4754. It is at the option of the mortgagee to have the mortgage recorded. If not intended to be recorded, it must bear the indorsement: "This instrument to be filed but not recorded."

² Dig., §§4287, 4288; Mansfield's Dig. (1884), §§4750-4758; *Jones on Chat. Mort.*, §192; *Applewhite v. Harrell*, 49 Ark. 279; s. c. 5 S. W. Repr.

292; *Watson v. Thompson*, 49 Ark. 83; s. c. 4 S. W. Repr. 62; *Hall v. Pillow*, 31 Ark. 32; *Ringo v. Wing*, 49 Ark. 457; 5 S. W. Repr. 787; *Simpson v. Shackelford*, 49 Ark. 63; s. c. 4 S. W. Repr. 165; *Case v. Hargadine*, 43 Ark. 144; *Lemay v. Williams*, 32 Ark. 166.

Mortgages of crops, *Johnson v. Grizzard*, 51 Ark. 410; s. c. 11 S. W. Repr. 585; *Douds v. Neel*, 41 Ark. 70; *Krone v. Phelps*, 43 Ark. 350.

§293a. Proof by Witnesses.

Proof for record may be made by one of the subscribing witnesses to any conveyance. The certificate in such case is as follows:

STATE OF..... }
COUNTY OF..... } ss.

Be it remembered that on this day came before me (title of officer), in and for said county and state, ...one of the subscribing witnesses to the foregoing (deed) to me personally well known, who being by me first duly sworn, stated that he saw....., the grantor in said (deed) subscribe the same on the day of its date (or that he acknowledged in his presence on the....day of....., 18..., that he had executed said (deed) for the consideration and purposes therein expressed) and that he and....., the other subscribing witness, subscribed said (deed) as attesting witnesses at the request of said grantor.

In testimony whereof, I have hereunto set my hand and seal of office, on this....day of.....18...

(Signature and title).¹

¹ Mansfield's Dig., §§655-657; Form No. 145. The certificate of proof of the handwriting of the grantor and a subscribing witness, such proof to be made by two witnesses, may be as follows:

STATE OF..... }
COUNTY OF..... } ss.

Be it remembered that on this....day of.....18..., came before me, a (title of officer), in and for said county and state, ...and, and upon their oaths stated that the signatures of....., the grantor in the foregoing (deed) and of.....a witness thereto, are genuine, and are in the handwriting of said.....and.....respectively.

In testimony whereof, I have hereunto set my hand and seal of office on this the....day of....., 18...

(Signature and title.)

CALIFORNIA.

§294. Effect of Record.

Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property or any part thereof in good faith and for a valuable consideration, whose conveyance is first duly recorded.¹ The instrument is notice from the time it is filed for record. "Conveyance" is any instrument affecting real property, except wills.² A power of attorney, when recorded, can be revoked only by an instrument recorded in the same office.³ Grants absolute in terms are to be recorded in one set of books, and mortgages in another.⁴

Hittell's Cal. Codes, §6214; Civ. Code, §1214; *Fish v. Bensen*, 71 Cal. 428; s. c. 12 Pac. Repr. 454; *Allison v. Thomas*, 72 Cal. 562; s. c. 1 Am. St. Rep. 89; 14 Pac. Repr. 309; *DeSepulveda v. Baugh*, 74 Cal. 468; s. c. 5 Am. St. Rep. 455; 16 Pac. Repr. 223; *Cook v. McChristian*, 4 Cal. 23; *Hager v. Spect*, 52 Cal. 579; *Odd Fellows Bank v. Banton*, 46 Cal. 603; *Long v. Dollarhide*, 24 Cal. 218; *McCabe v. Grey*, 20 Cal. 509.

² Hittell's Cal. Codes, §§6212, 6215; Civ. Code, §1213. Actual notice is effectual. *Hilton v. Young*, 73 Cal. 684; s. c. 14 Pac. Repr. 684; *Montgomery v. Kopperl*, 75 Cal. 128; s. c. 19 Pac. Repr. 178; *Duff v. Duff*, 71 Cal. 513; s. c. 12 Pac. Repr. 570; *Jones v. Marks*, 47 Cal. 242; *Moss v. Atkinson*, 44 Cal. 3.

A quit-claim purchaser is protected. *Allison v. Thomas*, *supra*; *Graff v. Middleton*, 43 Cal. 341; *Frey v. Clifford*, 44 Cal. 335.

³ Civ. Code, §1216; *Dow v. Gould*, 31 Cal. 646. Deed to wife notice of separate property. *McComb v. Spangler*, 71 Cal. 419; s. c. 12 Pac. Repr. 347; *Ramsdell v. Fuller*, 28 Cal. 38. The statute provides for a registry of the separate personal property of the wife. Hittell's Codes, §5165. As to community property, *Moore v. Jones*, 63 Cal. 12; *Alverson v. Jones*, 10 Cal. 9; s. c. 70 Am. Dec. 689.

⁴ Hittell's Cal. Codes, §6171; Civ. Code, §1171. Possession is notice. *Smith v. Yule*, 31 Cal. 180; s. c. 89 Am. Dec. 167; *Peasley v. McFadden*, 68 Cal. 611; s. c. 10 Pac. Repr. 179; *Fair v. Stevenot*, 29 Cal. 486; even by a grantor after record of a deed from him. *Pell v. McElroy*, 36 Cal. 268; *Daubenspeck v. Platt*, 22 Cal. 230.

An attaching creditor is not protected against an unrecorded deed, if such deed is recorded before sale under the judgment. Justices' judgments must be registered. C. C. P. 671-674. Antecedent debt is valuable consideration. *Hunter v. Watson*, 12 Cal. 373; s. c. 73 Am. Dec. 543; *Gassen v. Hendrick*, 74 Cal. 444; s. c. 16 Pac. Repr. 242.

§295. Mortgages, Real and Chattel.

Assignments of mortgages may be recorded, and are constructive notice, but not to the mortgagor so as to inval-

idate payments made by him to a person holding the note, bond or other instrument secured by the mortgage.¹ De-feasances must be recorded in order to defeat or affect an absolute grant as against any person other than the grantee, his heirs or devisees, or persons having actual notice.² Mortgages may be discharged of record by an entry in the margin of the record, or by a certificate duly acknowledged or proved and recorded.³ Mortgages of personal property are to be acknowledged, proved and recorded as those of real property, but in books kept for personal mortgages exclusively. They are to be recorded in the county in which the mortgagor resides, and also in the county in which the property is situated, or to which it may be removed, and are void against creditors and subsequent purchasers and incumbrancers in good faith and for value, unless accompanied by the affidavit of all the parties thereto that the mortgage is made in good faith, and without any design to hinder, delay or defraud creditors.⁴ Only certain specified kinds of personal property are subject to mortgage.⁵ Possession is required to accompany transfers of personal property other than mortgages.⁶

¹ Hittell's Cal. Codes, §§7934, 7935; Civ. Code, §§2934, 2935. The wife need not join unless she be named as a mortgagee.

² Civ. Code, §2950; *Enos v. Cook*, 65 Cal. 175; s. c. 3 Pac. Repr. 632; *Tully v. Harlow*, 35 Cal. 302; s. c. 95 Am. Dec. 102. See as to mortgages, *Vogan v. Caminette*, 65 Cal. 438; *Cheeever v. Fair*, 5 Cal. 337.

³ Hittell's Codes, §7941; Civ. Code, §§2939-2941; *Beal v. Stevens*, 72 Cal. 451; s. c. 14 Pac. Repr. 186; *ante*, §34.

⁴ Hittell's Cal. Codes, §§7963, 7959; Civ. Code, §§2963, 2959; *Boyle Ice Co. v. Gould*, 73 Cal. 153; s. c. 14 Pac. Repr. 609.

⁵ Hittell's Codes, §7955; Civ. Code, §2955; *Tregear v. Etiwanda Co.*, 76 Cal. 537; *Boyle Ice Co. v. Gould*, *supra*. As to mortgages of crops, see *Quirague v. Dennis*, 24 Cal. 154; *Goodyear v. Willis*, 42 Cal. 11; *Wilson v. Prouty*, 70 Cal. 196; s. c. 11 Pac. Repr. 608; *Martin v. Thompson*, 63 Cal. 4.

⁶ Civ. Code, §3440. Under a former statute actual possession was required as to mortgages. *Woods v. Bugbey*, 29 Cal. 66; *Regli v. McClure*, 47 Cal. 612; *O'Brian v. Chamberlain*, 50 Cal. 285; *Ede v. Johnson*, 15 Cal. 53; *Meherin v. Oaks*, 67 Cal. 57; s. c. 7 Pac. Repr. 47; *Wilson v. Prouty*, 70 Cal. 196; s. c. 11 Pac. Repr. 608; *Bersan v. Neman*, 63 Cal. 550.

§296. Acknowledgment may be taken within the state by a justice or clerk of the Supreme Court, or a judge of the superior court, or, when acting within his county or district, by a clerk of a court of record, a court commissioner, county recorder, notary public or justice of the peace.

Without the state and within the United States, by any court having a seal, or the clerk thereof, a notary public, commissioner of deeds, or by any other officer of the state or territory where taken, authorized by its laws to take acknowledgments.

In foreign countries, by a notary public, commissioner of deeds for California, judge of a court of record, minister, *chargé d'affaires*, consul, vice-consul, or consular agent of the United States.¹ Where the acknowledgment is by an attorney in fact, the certificate must show that such attorney acknowledged that he subscribed the name of his principal, as principal, and his own name as attorney in fact.² Where the deed is by a corporation, the certificate should show that the person acknowledging it (the president or secretary) acknowledged "that such corporation executed the same." The form of single acknowledgment is as follows:

THE STATE OF..... }
COUNTY OF..... }

On this.....day of....., in the year....., before me (name and quality of officer), personally appeared, known to me (or proved to me on the oath of.....), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

[SEAL.]

(Signature and title.)

¹ Civ. Code, §§1181-1183; *De Arnaz v. Escandon*, 59 Cal. 486; *Bryan v. Romerez*, 8 Cal. 461; s. c. 68 Am. Dec. 340; *Miner's Co. v. Zellerbach*, 37 Cal. 543; *Touchard v. Crow*, 20 Cal. 150; s. c. 81 Am. Dec. 108; *Fogarty v. Finlay*, 10 Cal. 239; s. c. 70 Am. Dec. 714; *Foorman v. Wallace*, 75 Cal. 552; s. c. 17 Pac. Repr. 680.

² Civ. Code, §1192; *Hittell's Codes*, §6192.

§297. Acknowledgment of Married Women.

The deed of a married woman must be acknowledged by her; it cannot be proved for record by witness. As the wife has no right of dower, she need not join in a conveyance of her husband's separate estate, nor he in a deed of her separate property. They must join in a conveyance of community property, and separate examination of the wife is required. The form of certificate is as follows:

STATE OF..... }
 COUNTY OF..... }

On this.....day of....., in the year....., before me (name and quality of officer), personally appeared, known to me (or proven to me on the oath of, to be the person whose name is subscribed to the within instrument, described as a married woman; and upon an examination without the hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution.

[SEAL.

(Signature and title.)¹

¹ Hittell's Codes, §6191; C. C., §1191; *Hutchinson v. Ainsworth*, 63 Cal. 286; *Muir v. Galloway*, 61 Cal. 498; *Fogarty v. Finlay*, 10 Cal. 239; s. c. 70 Am. Dec. 714; *Reis v. Lawrence*, 63 Cal. 120; s. c. 40 Am. Rep. 83; *Hand v. Hand*, 68 Cal. 135.

Wherever the name of the owner of any real estate is from any cause changed, his or her conveyance thereof must set forth the name in which he or she derived title to such real estate. Wife may convey by power of attorney. §6094; *Dow v. Gould*, 31 Cal. 646. Where the certificate was in due form, proof that the acknowledgment was taken by telephone over a distance of three miles, no fraud, duress or mistake being alleged, held not to invalidate. *Banning v. Banning*, 22 Pac. Repr. 210.

§298. Proof by Subscribing Witnesses.

Proof for record may be made by a subscribing witness. The certificate should show that the witness was sworn and deposed that the person whose name is subscribed to the instrument as a party is the person described in it, and that

such person executed it, and that the witness subscribed his name thereto as a witness.¹ Proof for record may also be made by other witnesses as to the hand-writing, where all the parties and witnesses are dead, non-residents of the state, or their residence unknown.

¹ Civ. Code, §§1195-1198; *Whitney v. Arnold*, 10 Cal. 531. Witnesses are not necessary to the validity of conveyances, except wills.

COLORADO.

§299. Effect of Record.

All deeds, conveyances, agreements in writing of, or affecting title to real estate or any interest therein, and powers of attorney for the conveyance of any real estate or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such office, and not before, such deeds, bonds and agreements in writing shall take effect as to subsequent *bona fide* purchasers and incumbrancers by mortgage, judgment or otherwise, not having notice thereof.¹ A recorded deed is admissible in evidence without proof of its execution where it has been duly acknowledged.²

¹ Gen. Stats. (1883), §215 ; Gillett v. Gaffney, 3 Colo. 351; City Bk. v. Goodrich, 3 Colo. 139. Wills are excepted from this chapter, §229. Powers of attorney are to be acknowledged or proved as deeds. §214.

² Gen. Stats., §§216, 217. See as to effect of record, *McMurtrie v. Riddell*, 9 Colo. 497; *s. c.* 13 Pac. Repr. 181; *Tabor v. Sullivan*, 20 Pac. Repr. 437; *Tritch v. Norton*, 10 Colo. 337; *Goodrich v. Michael*, 3 Colo. 77; and as to homestead release, *Goodwin v. Colo. Mining Co.*, 110 U. S. 1.

§300. Mortgages, Real and Chattel.

Mortgages of real property are included with deeds; there being no separate provisions as to their record. Chattel mortgages are not valid as against the rights and interests of any third person, unless possession of the property be taken, or they are acknowledged and recorded, and provide for the property to remain with the mortgagor.¹ They are to be recorded in the county where the property or the greater portion thereof is situated, and the record continues effectual for not exceeding two years, if the principal of the mortgage debt do not exceed \$2,500.00; five years if it be more than \$2,500.00, and not more than \$20,000.00; and ten years if more than \$20,000.00. If the mortgage debt secured is greater than \$2,500.00, a sworn statement of the mortgagee, or one of the mortgagees, must be recorded annually, showing that

the mortgage was given in good faith to secure the sum mentioned; and that said sum is still unpaid; or if a portion thereof shall have been paid, then how much, if any, remains unpaid.² The lien of a duly filed chattel mortgage securing a sum not over \$300.00, payable in one installment, and due not more than 18 months after its execution, may be extended for a period not over six months from the maturity of the debt by the mortgagee or his assignee filing at the maturity of the debt, a sworn statement of the amount of the debt still unpaid; and that it is still due the mortgagee or his assignee, and that said mortgagee or his assignee consents to extend said mortgage for some period not exceeding six months.³ Bills of sale and deeds of trust of personal property are to be recorded as mortgages. Actual notice supplies the place of registry.⁴ Chattel mortgages are to be acknowledged before any officer authorized to take acknowledgments of real estate.⁵ Certified copies of a recorded chattel mortgage are admissible in evidence without proof of execution, upon accounting for the non-production of the original.⁶

¹ Gen. Stats., ch. 14, §163; *Machette v. Wanless*, 1 Colo. 225; *Crane v. Chandler*, 5 Colo. 21.

² Gen. Stats., §165; Session Laws, 1889, p. 54; *Wilson v. Voight*, 9 Colo. 614; s. c. 13 Pac. Repr. 726; *Homer v. Stout*, 5 Colo. 265; *Brasher v. Christopher*, 10 Colo. 28; s. c. 15 Pac. Repr. 403.

³ Gen. Stats., §165, as amended by Laws 1889, p. 54.

⁴ Gen. Stats., §§169, 172; *McKee v. Mining Co.*, 8 Colo. 392; s. c. 8 Pac. Repr. 561; *Gerow v. Costello*, 11 Colo. 560.

⁵ Gen. Stats., §164. Under a former provision, requiring chattel mortgages to be acknowledged before a justice or notary public in the precinct where the mortgagor resided, it was held that a foreign corporation, doing business in Colorado, could not execute a valid chattel mortgage there. *Cook v. Hager*, 3 Colo. 386.

⁶ Gen. Stats., §166. Where the sum secured does not exceed \$300.00, and the time does not exceed six months, the mortgage may be filed and indexed, without being recorded at length; and a duly certified copy of it may be used in foreclosure the same as the original. Session Laws 1889, p. 53, amending §166 of the Gen. Stats.

§301. Acknowledgment.

The acknowledgment of a deed is not necessary to admit it to record, nor to the effect of the record as constructive notice; but is necessary to admit the instrument in evidence as a recorded instrument without proof of its execution.¹ Acknowledgment may be made within the state before any justice of the Supreme, District or County Court, or clerk, or deputy clerk of either, or notary public, or clerk of the United States Circuit or District Court, or justice of the peace within his county.

Without the state and within the United States, before a secretary of state, or clerk of any court of record having a seal, or before any other officer authorized by the laws of such state or territory, in which latter case a certificate of magistracy, *etc.*, is required.

In foreign countries, before any court of record having a seal, mayor or other chief officer of any city or town having a seal, or before any consul of the United States in such foreign country, or commissioner of deeds for Colorado.² The certificate of acknowledgment may be as follows:

STATE OF..... }
COUNTY OF..... }

I (name, title and locality of officer), do hereby certify that (naming the person), who is personally known to me (or proven to me by the oath of a creditable witness) to be the same person whose name is subscribed to the foregoing (or within) instrument of writing as a party thereto, appeared before me this day in person and acknowledged that (he or she) executed the same for the uses and purposes therein set forth.

Witness my hand and the seal of said court (or if by notary, say notarial seal), this.....day of.....18...

[SEAL.]

(Signature and title.)

The statutory certificate of the acknowledgment of a chattel mortgage is thus: "This mortgage was acknowl-

edged before me by (mortgagor) this the.....day of, A. D. 18..."³ A married woman may convey as if *sole*; no separate examination or different certificate is requisite to her deed.⁴ The statute makes no provision for proof for record by witnesses.

¹ Rev. Stats., §217; *Holladay v. Dailey*, 1 Colo. 460. Acknowledgment estops the grantor from denying his signature. *Chivington v. Colorado Co.*, 9 Colo. 597; s. c. 14 Pac. Repr. 212.

² Rev. Stats., §§210, 211. The certificate must show the identity of the grantor. §212; *Quimby v. Boyd*, 8 Colo. 194; s. c. 6 Pac. Repr. 462; *Cook v. Hager*, 3 Colo. 386; *Nippel v. Hammond*, 4 Colo. 211.

³ Rev. Stats., §164.

⁴ Rev. Stats., §2278.

CONNECTICUT.

§302. Effect of the Record.

No conveyance shall be effectual to hold lands against any other person but the grantor and his heirs, unless recorded on the records of the town in which the lands lie, and the record is to bear date from the time of filing the instrument.¹ Where a conveyance is executed by a power of attorney, it shall be recorded with the deed. An unacknowledged deed or any instrument intended as a conveyance of lands, but which by reason of a formal defect shall operate only as a conveyance of an equitable interest, may be recorded, and the record thereof is constructive notice of such equitable interest.² Leases of land for a longer period than one year must be recorded. Where a recorded deed has been lost, a certified copy may be recorded.³ Chattel mortgages are to be executed, acknowledged and recorded in the same manner as in a mortgage of real estate.⁴

¹ Gen. Stats. of Conn. (1888), §2961; *Orvis v. Newell*, 17 Conn. 97; *Bissell v. Nooney*, 33 Conn. 411; *Barnum v. Landon*, 25 *Id.* 137; *Hamilton v. Nutt*, 34 *Id.* 501; *Salisbury v. Cutting*, 50 Conn. 113; *Lewis v. Ferrell*, 51 Conn. 216.

² Gen. Stats., §2964. Actual notice is effectual. *Campbell v. Roach*, 45 Conn. 667; *Lewis v. Hinman*, 56 Conn. 55; s. c. 13 Atl. Repr. 143; *Blatchley v. Osborne*, 33 Conn. 226.

³ Gen. Stats., §§2965, 2963. Possession not of itself notice. *Harrall v. Laverty*, 50 Conn. 46; *Bush v. Golden*, 17 *Id.* 594. As to creditors and purchasers, see *Goddard v. Prentice*, 17 Conn. 546; *Brush v. Scribner*, 11 Conn. 388; *Osborn v. Carr*, 12 Conn. 195.

⁴ Gen. Stats., §3016; *Walker v. Vaughan*, 33 Conn. 577. See as to mortgages of realty, *Boswell v. Goodwin*, 31 Conn. 74; s. c. 81 Am. Dec. 169; *Bush v. Golden*, 17 *Id.* 594; *Lewis v. Ferrell*, *supra*.

§303. Acknowledgment within the state may be made before a justice of the peace, notary public, judge or clerk of a court of record, commissioner of the school fund, commissioner of the superior court, or town clerk.

Without the state and within the United States, before a commissioner appointed by the governor of this state and residing therein, or any officer authorized to take the acknowledgment of deeds in such state or territory.

In foreign countries, before a United States consul, notary public, or justice of the peace.¹ The certificate of acknowledgment may be as follows:

STATE OF }
COUNTY OF } ss.

....., Sept. 13, A. D. 18... Then and there before me (name and title of officer), within and for the county and state aforesaid, duly commissioned and acting as such, personally appeared.....and....., his wife, signers and sealers of the foregoing instrument, and severally acknowledged the same to be their free act and deed before me (or personally appeared.....agent of the.....Company, signer and sealer of the foregoing instrument, and acknowledged the same to be its free act and deed before me).

Witness my hand and seal of office, on this.....day of....., 18...

[SEAL.]

(Official signature and title.)

No separate acknowledgment for a married woman is requisite, but the husband must join in the wife's deed, except where he is absent, and has been absent for as much as three years.² Deeds require two attesting witnesses, but proof for record by subscribing witnesses is not provided for. Where the grantor refuses to acknowledge, process may be issued to compel acknowledgment.³

¹ Gen. Stats., §§2954, 2956. The officer must be acting within the territorial limits of his jurisdiction. A certificate of the county clerk should be annexed to an acknowledgment made before a justice of the peace. Interest does not disqualify the officer, or a witness. §2955.

² Gen. Stats., §§484, 2960. Appeal of Spitz, 56 Conn. 184; s. c. 14 Atl. Repr. 774; §2278.

³ Gen. Stats., §2958. See as to certificate of acknowledgment, *Hayden v. Westcott*, 11 Conn. 129; *Sandford v. Bulkley*, 30 *Id.* 344; *Stanton v. Button*, 2 *Id.* 527. Deed not good without witnesses. *Winsted Bank v. Spencer*, 26 *Id.* 195; *Carter v. Champion*, 8 *Id.* 549; s. c. 21 Am. Dec. 695.

DAKOTA; NORTH.

§304. Effect of Record.

Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or incumbrancer, including an assignee of a mortgage, lease or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.¹ The record must be made in the county where the land lies, and the instrument is notice from the time of its deposit for record.² Conveyances of lands in an unorganized county are to be recorded in the county in which the court is held for the judicial subdivision embracing the unorganized county.³

Rev. Code of Dak. (1877), §671; *Gale v. Shillock*, 29 N. W. Repr. 661. "Conveyance" does not include wills, executory contracts and powers of attorney. §672.

² Rev. Code, §651. Actual notice is effectual. *Gress v. Evans*, 1 Dak. 387. As to record of *lis pendens*, see *Bateman v. Backus*, 34 N. W. Repr. 6; mechanic's lien, *McCormack v. Phillips*, 34 N. W. Repr. 39; recitals as charging notice, *Wallace v. Evans*, 1 Dak. 387.

³ Laws 1881, ch. 121, §1.

§305. Mortgages, Real and Chattel.

Mortgages must be recorded in books kept separate from those for other conveyances. Where an instrument appears by any other writing to be intended as a mortgage, it must be recorded as such, and if the defeasance be not recorded at the same time and place, the grantee can derive no benefit from such record, but as to third persons having no actual notice of the unrecorded defeasance, the recorded deed is conclusive as an absolute grant.¹ A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging its satisfaction in the presence of the register; or by certificate duly acknowledged or proved and recorded. Chattel mortgages must be filed in the county where the property, or any part thereof, is situated. Unless duly filed they are void as

against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value. They must be signed by the mortgagor in the presence of two persons who must sign the same as witnesses thereto, and no further proof or acknowledgment is required. The record ceases to be valid after three years from the filing, unless within thirty days next preceding the expiration of such term, a copy of the mortgage and a sworn statement of the amount of debt then existing be filed anew.²

¹ Rev. Code, §§530, 652, 1626-1628, 1739-1741a.

² Rev. Code, §§1744-1751; First Nat. Bank v. Comfort, 4 Dak. —; s. c. 28 N. W. Repr. 855. Personal property used in conducting the business of a common carrier is to be taken as situated in the county in which the principal office or place of business of the carrier is located. Successive re-filings every three years are necessary to preserve the lien.

§306. Acknowledgment.

Judgments and patents do not require acknowledgment.¹ Acknowledgment may be made within the state before a justice or clerk of the Supreme Court, or notary public, or, when acting within his territorial jurisdiction, before a judge or clerk of a court of record, mayor of a city, register of deeds, justice of the peace, a United States circuit or district court commissioner, a county clerk or a county auditor.

Without the territory and within the United States, before a justice, judge or clerk of any court of record of the United States or any state or territory, or any other officer authorized by its laws to take acknowledgments; or notary public, or commissioner of deeds for Dakota.

In foreign countries, before a resident minister, commissioner or *chargé d'affaires*, consul, vice-consul, or consular agent of the United States, judge of a court of record, or notary public of such country. The acknowledgment may be taken by a deputy where the officer is authorized by law to appoint a deputy. An official seal must be used if by the local law the officer is required to have such seal. The

certificate of a justice of the peace must be accompanied by a certificate of magistracy where the deed is to be recorded outside of his own county.² The certificate of single acknowledgment is as follows:

STATE, OR TERRITORY, OF..... }
 COUNTY OF..... }

Be it remembered that on this.....day of....., A. D. 18..., before me (name and title of officer), within and for said county, personally appeared....., well known to me to be the person who is described in and who executed the within instrument, and duly acknowledged to me that he executed the same freely.

[SEAL.]

(Signature and title.)

Where the acknowledgment is on behalf of a corporation, the certificate recites, "personally appeared....., known to me (or proved to me on the oath of.....), to be the president (or the secretary) of the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same."

¹ Rev. Code, §647.

² Rev. Code, §§656-658, 666; Laws 1885, ch. 1, §1. The statute authorizes an action to correct a defective certificate of acknowledgment. §667.

§307. Acknowledgment of Married Women.

A married woman may convey as if *sole*, and a privy acknowledgment is not requisite. In case of a conveyance of the homestead, where both husband and wife are residents of the territory, they must concur in and sign the same joint instrument. A conveyance or other instrument executed by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same way.¹

¹ Rev. Code, §666 (3); Pol. Code, ch. 38, §3; *Wambole v. Foote*, 2 Dak. 1; s. C. 2 N. W. Repr. 239.

§308. Proof by Witnesses.

Proof for record may be made by a subscribing witness, who must depose to the identity of the grantor, and that such grantor executed the instrument, and that he subscribed it as a witness at the grantor's request.¹

¹ Rev. Code, §662. Proof of handwriting of the grantor and one subscribing witness may be made when the grantor and the witnesses are all dead, or absent from the state, or their residence unknown. Where proof of handwriting is made the original deed is required to remain in the recorder's office as a public archive. §§649, 663, 664.

Witnesses or seals are not necessary to the validity of a deed or other instrument affecting the title to real property, except wills.

DAKOTA; SOUTH.

At present writing (February, 1890,) the law is the same as that of North Dakota.

DELAWARE.

§309. Effect and Time of Record.

A deed which is not recorded in the recorder's office for the county in which the land is situated within three months after the day of its sealing and delivery will not avail against a subsequent fair creditor, mortgagee or purchaser for a valuable consideration, unless it be shown that the creditor when giving the credit, or the mortgagee or purchaser when advancing the consideration, had notice of such deed.¹ Purchase money mortgages and defeasances are to be recorded within thirty days.²

¹ Rev. Code of Del. (1874), p. 504, §§14-17; Acts 1883, p. 509; Hall v. Livingston, 3 Del. Ch. 348; Potts v. Dowdall, 3 Houst. 369.

² Rev. Code, p. 505, §§18, 21; Acts 1883, p. 509; Lank v. Hiles, 4 Houst. 87.

§310. Mortgages, Real and Chattel.

Mortgages and conveyances in the nature of mortgages have priority according to the date of record, and if two or more mortgages of the same premises are lodged in the recorder's office at the same time, they stand in priority according to their respective dates. Where a conveyance absolute on its face is accompanied by a defeasance, a memorandum of the defeasance and its purport must be indorsed on the conveyance and recorded therewith, or the record is of no effect; and the defeasance itself must be duly recorded within sixty days, or it will not avail against fair creditors, mortgagees and purchasers for value, and without notice from the person to whom the conveyance is made.¹ Chattel mortgages duly acknowledged must be filed within ten days from the time of acknowledgment in the recorder's office of each county where any of the property is held;² and when duly recorded are a valid lien for three years. The law contemplates that the mortgagor shall remain in possession, and forbids him removing the property out of the county.

¹ Rev. Code, p. 504. Unless a purchase money mortgage be recorded within thirty days, it will not have precedence over judgment and other liens of prior date. *Id*; Acts 1883, p. 509.

² Laws 1877, ch. 477, §§1, 3, 4.

§311. **Acknowledgment** may be made within the state before a notary public, or judge of any court, or chancellor, or any two justices of the peace of the same county.

Without the state and within the United States, before any judge of a district or circuit court of the United States, or the chancellor or any judge of a court of record, or the mayor or chief officer of any city or borough, and certified under the hand of such chancellor, judge, mayor or officer and the seal of his office, court, city or borough; or in open court, certified under the hand of the clerk and the seal of the court; or before a notary public or a commissioner of deeds for Delaware.

In foreign countries, before any consul-general, consul or commercial agent of the United States duly appointed in such foreign country at the places of their respective official residences.²

The wife must join in the husband's deed in order to relinquish dower, and a separate examination is required. The form of joint certificate is as follows:

STATE OF..... }
COUNTY OF..... }

Be it remembered that on the.....day of....., A. D. 18.., personally came before the subscriber (name and title).....and.....his wife, parties to this indenture, known to me personally (or proved on the oath of to be such), and severally acknowledged said indenture to be their act and deed respectively; and that the said.....being at the same time privately examined by me apart from her husband, acknowledged that she executed the said indenture willingly, without compulsion or threats or fear of her husband's displeasure.

Given under my hand and official seal the day and year aforesaid.

(Signature and title.)

Where the deed is that of a corporation, it should be executed by the president, and the certificate should state that he “acknowledged the said indenture to be his act and deed, and the act and deed of the said company; that the signature of the said president is his own proper handwriting; that the seal affixed is the common or corporate seal of said company, and that his act of sealing, executing and delivering said indenture was duly authorized by resolution of the directors (or trustees or other managers of said company).” There is no provision made by statute for proof of deeds by subscribing witnesses out of the state. Deeds require one witness and a seal; but a scrawl will suffice for a seal.

¹ Rev. Code, ch. 83, §§3-10; *Doe v. Prettyman*, 1 *Houst.* 339; *Harris v. Burton*, 4 *Harr.* 60. The record of deeds dated prior to Jan. 1, 1845, duly signed and sealed by the grantors, will be admitted in evidence as valid, though the acknowledgments thereof be defective, except that such deeds *shall not* bar dower. *Laws 1885*, p. 915.

DISTRICT OF COLUMBIA.

§312. Effect of Record.

All deeds, deeds of trust, mortgages and other conveyances entitled to record take effect and are valid as to creditors and as to subsequent purchasers for value without notice from the time when the instrument, duly acknowledged or proved, is delivered to the recorder for record, and from that time only.¹ The recorder must note the day and hour of filing.

¹ Rev. Stats. Dist. of Columbia, 1874, §§446, 447, as amended by act of April 29, 1878; 20 U. S. Stats. at L. 39; *Jackson v. Blackwood*, 4 MacArth. 188. The former statute allowed six months for the record of deeds. Title bonds and written contracts relating to land may be recorded.

§313. Mortgages, Real and Chattel.

Deeds of trust are mostly in use, and their release is by deed of release from the trustee. A bill of sale, deed of trust or mortgage of property exempt by law from execution is not binding, unless signed by the wife of the debtor, and must be recorded within twenty days after execution.¹

Notice of a mechanic's lien must be filed in the office of the clerk of the supreme court during the construction, or within three months after the completion, of the building, and prior liens are postponed to the mechanic's lien unless recorded before the beginning of the work.²

¹ Rev. Stats. D. C., §798. See as to record of mortgages, *Kurts v. Hollingshead*, 3 Cranch C. Ct. 68; *Jackwood v. Blackwood*, 4 MacArth. 188; *Wagner v. Watts*, 2 Cranch C. Ct. 169.

² Rev. Stats., §§692-710.

§314. **Acknowledgment** within the United States may be made before any judge of a court of record and of law, chancellor of state, judge of supreme, circuit, district or territorial court of the United States, notary public, justice of the peace, or commissioner of deeds for the District of Columbia, within the state, district or territory in which the person making the deed may be living.

In foreign countries, before a judge or chancellor of any court, master, or master extraordinary in chancery, notary

public, secretary of legation or consular officer of the United States.¹ *The certificate of single acknowledgment is as follows:

STATE OF..... }
COUNTY of..... }

I (name and full title of officer), in and for the county of aforesaid, in the state of.....do hereby certify that.....party to a certain deed bearing date on the day of.....A. D. 18.., and hereto annexed, personally appeared before me in the county aforesaid, the said.....being personally well known to me as (or proved by the oath of credible witness before me to be) the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and seal, this.....day of.....
....A. D. 18...

¹ Rev. Stats., §§441, 444; Cowan v. Beall, 1 MacArth. 270. Where the acknowledgment is taken out of the district by a local officer, his certificate should be accompanied by a certificate of magistracy from the register, clerk or other public officer having cognizance of the fact, under his seal, to the effect that at the date of acknowledgment the officer taking the same was in fact the officer he purported to be. §443. This does not apply to the secretary of legation or consular officers of the U. S. §445.

The only provisions authorizing acknowledgment of deeds under power of attorney are the Maryland Acts of 1715 and 1766, which do not, however, authorize the execution of the deed under the power, but require that the power of attorney shall be proved and the acknowledgment made in open court. Under existing laws it is so much more convenient for the grantor himself to acknowledge the deed, that powers of attorney to make acknowledgment are not used.

§315. Acknowledgment of Married Women.

A separate examination of the wife is necessary in a conveyance of the husband's property, in which she joins for the purpose of conveying her dower interest. The form of joint certificate, as relating to the privy examination of the wife, is as follows:

And the said E. F., wife of the said C. D., being by me examined privily and apart from her said husband, and

having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it.¹ The right of a married woman to real and personal property belonging to her at the time of marriage, or acquired during marriage otherwise than by gift or conveyance from the husband, is as absolute as if she were *sole*, not subject to disposal of her husband, nor liable for his debts, but may be by her conveyed, devised and bequeathed the same as if she were unmarried.²

¹ Rev. Stats., §§450-452; *Hitz v. Jenks*, 123 U. S. 298; *Edmondson v. Lovell*, 1 Cranch C. C. 103.

² Rev. Stats. D. C., §§727-730.

§316. Witnesses.

There is no statutory requirement as to the number of witnesses. It is customary to have a deed attested as signed, sealed and delivered in the presence of a single witness, usually the officer taking the acknowledgment; but a will devising real estate requires *three* witnesses.

FLORIDA.

§317. Effect of Record.

No conveyance is good or effectual in law or in equity against creditors or subsequent purchasers for value without notice, unless recorded in the county in which the lands are situated.¹ Deeds are required to be sealed, but a scrawl with the word seal written in it will suffice. If executed by an attorney in fact, the power of attorney must be recorded at the time of recording the conveyance. Instruments are deemed to have been recorded from the date the same were presented and filed with the officer required to record them.

¹ McClellan's Dig. (1881), ch. 32, §20; Bush's Dig. (1872), p. 151; Kearnes v. Hill, 21 Fla. 185; Tuten v. Gazen, 18 Fla. 751; Snow v. Lake, 20 Fla. 656; s. c. 51 Am. Rep. 625; Doyle v. Wade, 1 South. Repr. 516; Christy v. Burch, 2 South. Repr. 258. Possession is notice. Massey v. Hubbard, 18 Fla. 688.

§318. Mortgages, Real and Chattel.

The privilege of time for record is not extended to mortgages. Chattel mortgages are not effectual or valid for any purpose whatever, unless recorded within 90 days in the county where the property is at the time, unless the property be delivered to and remain with the mortgagee within sixty days after the execution of the mortgage. They should be acknowledged or proved as in case of mortgages of real property, or by proof being made upon oath by at least one credible person before the recording officer of the handwriting of the mortgagor.¹

¹ Acts of Nov. 15, 1828; and June 1, 1889. Sanders v. Papoon, 4 Fla. 465; Einstein's Sons v. Shouse, 24 Fla. —; s. c. 5 South. Repr. 380. Recording a deed is *prima facie* evidence of its delivery. Levy v. Cox, 22 Fla. 546, 580.

§319. Acknowledgments may be made within the state before any judge, clerk of the Circuit Court, notary public or justice of the peace.

Without the state and within the United States, before any judge or clerk of a court of record, notary public, jus-

tice of the peace, or other officer authorized by the laws of the state where taken to take acknowledgments, or before a commissioner of deeds for Florida.

In foreign countries, before a minister, *chargé d'affaires*, commissioner or consul of the United States there, or commissioner of deeds for Florida.¹ Where the officer taking the acknowledgment does not use a seal, a certificate of magistracy and conformity is required. The officer must certify to the identity of the grantor; but it is competent for him to satisfy himself of the identity of the parties at his own discretion. The form of certificate of single acknowledgment may be as follows:

STATE OF }
COUNTY OF }

Be it remembered that on this day of, in the year 18 . . , personally appeared before me (name and title of officer) John Smith, to me well known to be the person who executed the foregoing (or annexed) deed by him sealed and subscribed, and the said John Smith acknowledged the execution thereof to be his free act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.]

(Signature and title.)²

¹ McClellan's Dig., pp. 216-219; Tuten v. Gazen, 18 Fla. 751.

² Stewart v. Mathews, 19 Fla. 752; Hogans v. Caruth, 18 Fla. 587; Carr v. Thomas, 18 Fla. 736; McCoy v. Bailey, 21 Fla. 803; Munde v. Freeman, 3 South. Repr. 153.

§ 320. Acknowledgment of Married Women.

A wife must join in the deed of the husband in order to relinquish her right of dower; or the relinquishment may be by separate instrument duly acknowledged by the wife. The husband must also join in the conveyance of her separate property. The acknowledgment of the wife must be by privy examination. The form of certificate as to her may be as follows:

I (name and designation of officer) do hereby certify unto all whom it may concern that A. B., to me well known as the wife of C. B., and as one of the persons described in and who executed the foregoing deed of conveyance (or relinquishment of dower, as the case may be), did this day to me, on a private examination made separately and apart from her said husband, acknowledge and declare that she made herself a party to and executed the same for the purpose of renouncing and relinquishing all and every right of dower and all interest in and to the lands in said conveyance described, and that the same was done by her freely and voluntarily, and without any constraint, apprehension or fear of or from her said husband, the said C. B.

In witness whereof, I have hereunto set my hand and affixed my official seal this.....day of.....18..

[SEAL.]

(Signature and title.)¹

¹ McClellan's Dig., pp. 478, 479; Carn v. Haisley, 22 Fla. 317; Jones v. Loftin, 16 Fla. 189; Evans v. Summerlin, 19 Fla. 855; Hartley v. Ferrell, 9 Fla. 374.

§321. Proof by Witnesses.

Deeds executed within or without the state must be attested by two subscribing witnesses. Any deed may be proved for record by one of the subscribing witnesses thereto. The certificate of proof may be as follows:

STATE OF }
COUNTY OF }

Be it remembered that on this.....day of....., in the year...., before me (name and title of officer) personally appeared I. J., whose name is affixed as a subscribing witness to the foregoing deed between E. F. and G. H., and who being duly sworn, deposes and says that the said E. F. duly signed, sealed and delivered the foregoing deed to the said G. H. as his act and deed, in the presence of him, the said I. J., and also in the presence of K. L., the

other subscribing witness to the said deed, who then, at the request of the said E. F., duly signed and attested the same in the presence of the deponent and of the said E. F., the grantor.

In witness whereof, I have hereunto set my hand and affixed my seal the day and year first above written.

[OFFICIAL SEAL.]

(Signature and title.)¹

¹ Proof of execution of an instrument must include proof of its delivery. *Edward v. Thom*, 5 South. Repr. 707.

GEORGIA.

§322. Effect and Time of Record.

Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county in which the land lies within one year from the date of such deed. On failure to record within this time, the record may be made at any time thereafter, but such deed loses its priority over a subsequent deed from the same vendor recorded in time and taken without notice of the existence of the first.¹ The statute is different as to mortgages, and as to personal property, as will be seen in the succeeding section. Conditional sales of personal property are required to be recorded.²

¹ Code of Ga. (1882), §2705; Code (1873), ch. 8, art. 3, §2705; Howard v. Selman, 77 Ga. 904; Lee v. Cato, 27 Ga. 637; s. c. 73 Am. Dec. 476; Baskin v. Vernon, 74 Ga. 370; Johnson v. Wheelock, 63 Ga. 673; Bazeman v. Davis, 55 Ga. 504; Felton v. Pitman, 14 Ga. 536; Ellis v. Smith, 10 Ga. 253; Hunt v. Dunn, 74 Ga. 120; McGuire v. Barker, 61 Ga. 339; Wyatt v. Elam, 19 Ga. 335; Coleman v. Carhart, 74 Ga. 392; Knorr v. Raymond, 73 Ga. 749, 775; Nathans v. Arkwright, 66 Ga. 179; Grice v. Haskins, 77 Ga. 700.

A recorded deed is by statute made *prima facie* evidence of its due execution. Holland v. Carter, 79 Ga. 139; s. c. 3 S. E. Repr. 690; Code, §2713.

As to creditors, see Smith v. Jordan, 25 Ga. 687; Cooper v. Blakey, 10 Ga. 243; Chance v. McWhorter, 26 Ga. 313.

Actual notice is effectual. Blalock v. Newhill, 78 Ga. 245; Broughton v. Foster, 69 Ga. 714; Cunningham v. Woodbridge, 76 Ga. 302; Claflin v. Duncan, 74 Ga. 348; Rogers v. Haskins, 14 Ga. 166; Ratteree v. Conley, 74 Ga. 153; Bryant v. Booze, 55 Ga. 438; Virgin v. Wingfield, 54 Ga. 451; Papot v. S. W. Ry. Co., 74 Ga. 296.

Possession is notice. Neal v. Perkerson, 61 Ga. 345; Carter v. Halahan, *Id.* 314; Sewell v. Holland, 61 Ga. 608; Royal v. Lisle, 15 Ga. 545; Denham v. Hollman, 26 Ga. 191; Whittington v. Wright, 9 Ga. 23.

² Code (1882), §§1955a, 1957, 2710; Conder v. Holliman, 71 Ga. 93.

§323. Mortgages of Realty are to be recorded within thirty days from date, and if not recorded within that time remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage. If, however, the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded mortgage or the pur-

chaser has the like notice, then the lien of the older mortgage shall be held good against them.¹ Record of a mortgage after the time is notice from the time the record is made.²

¹ Code, §§1957, 1955. A mortgage so defectively recorded as not to give notice to a prudent inquirer shall not be held notice to subsequent *bona fide* deed purchasers or younger lien holders. A mere formal mistake in the record shall not vitiate it. §1959.

² Code, §1960; *Adair v. Davis*, 71 Ga. 769. In order to have precedence of an unrecorded senior mortgage, a junior mortgage must be recorded within its statutory time. *Myers v. Picquet*, 64 Ga. 260. When a junior judgment is founded on a debt antecedent to the date of a defectively recorded mortgage, it has priority over the mortgage, though the judgment creditor and the purchaser had actual notice of it. *Andrews v. Mathews*, 59 Ga. 466.

See as to record of mortgages, *Janes v. Penny*, 76 Ga. 796; *McGuire v. Barker*, 61 Ga. 339; *Thaxton v. Roberts*, 66 Ga. 704; *Wilson v. Peoples*, 61 Ga. 218; *Gibson v. Hough*, 60 Ga. 588; *Keith v. Catchings*, 64 Ga. 773; *Richards v. Myers*, 63 Ga. 762; *Tanner v. Bell*, 61 Ga. 584; *Boston v. Cummings*, 16 Ga. 102; *Wilson v. Peebles*, 61 Ga. 218; *Hull v. Sullivan*, 63 Ga. 126; *Broach v. Smith*, 75 Ga. 159; *Lowe v. Allen*, 68 Ga. 225; *Johnson v. Wheelock*, 63 Ga. 623.

Cancelling mortgage, Laws 1884, 1885, No. 315, §1. Restoring lost or mutilated records, Laws, 1887, No. 379, §1.

§324. Acknowledgments.

Conveyances are attested for record by the subscription of two witnesses, one of them being an officer. Within the state they may be attested before a notary public, judge or clerk of the superior court, or court of ordinary, or justice of the peace.

Without the state and within the United States, before a commissioner of deeds for Georgia, or judge of a court of record.¹

In foreign countries before a commissioner of deeds for Georgia, consul or vice-consul of the United States. Where the instrument is executed within the state no official seal is necessary. If the attestation is before the judge of a court of record in another state, there must be attached the certificate of the clerk that the signature of such judge is genuine. No certificate of acknowledgment is necessary. The attestation clause is "signed, sealed and delivered in

presence of.” If the conveyance be presented to the officer subsequent to its execution, the grantor acknowledges his signature and the officer certifies to that fact.²

¹ The provision as to judge of a court of record applies to deeds, but not to mortgages.

² Code, §§2706, 2707; *Dinkins v. Moore*, 17 Ga. 64; *Conley v. Campbell*, 78 Ga. 369; *Wardlaw v. Mayer*, 77 Ga. 620. A recorded deed is *prima facie* evidence of its execution. §2713; *Holland v. Carter*, 79 Ga. 139; s. c. 3 S. E. Repr. 690. Recording is *prima facie* evidence of delivery. *Fletcher v. Horne*, 75 Ga. 134.

§325. Acknowledgment of Married Women.

Where it is necessary for the wife to join in the deed for the relinquishment of dower, a privy examination and certificate of acknowledgment is necessary. Following is the form:

STATE OF..... }
COUNTY OF..... }

Be it remembered that on this.....day of.....
A. D. 18.., before me (name and title of the officer), duly commissioned and sworn, came....., and....., his wife, to me personally known to be the persons described in and whose signatures are affixed to the foregoing deed, and severally acknowledged the same to be their free act and deed for the uses and purposes therein mentioned; and the said....., on private examination by me, separately and apart from her husband, acknowledged and agreed that she did of her own free will and accord subscribe, seal and deliver the said conveyance with an intention thereby to renounce, give up and forever quit-claim to.....her rights of dower and thirds and all other interest of, in and to the land and tenements therein described.

[SEAL.]

(Official signature.)¹

¹ Code (1882), §2706a; *Brown v. Kimbrough*, 55 Ga. 41. There is no necessity for renunciation of dower by the wife except where the husband is alienating lands to which he derived title through the wife by marriage. As to marriages contracted since the statute of 1866, this cannot occur. That the joinder of the wife in the deed is sufficient to bar dower in lands held by the husband through marriage previous to 1866, see Rev. Code, §1754, clause 5.

§326. Proof by Witnesses.

Two subscribing witnesses are requisite, and without them the record is ineffectual.¹ Where the instrument has not the statutory attestation before an officer, it may be proved for record before any of the officers above named by the oath of a subscribing witness. The certificate of proof is as follows:

STATE OF..... }
COUNTY OF..... }

Before me (name and title of officer), personally came John Smith, to me known to be the individual whose signature is affixed to the foregoing deed as one of the witnesses thereto, who being sworn says that he was present at the time when said deed was executed, that he saw the same signed, sealed and delivered by John Doe, whose signature is thereto affixed as grantor, that Richard Roe, the other subscribing witness thereto, was likewise present at said time and witnessed said execution of said deed, and that he, the said John Smith, and the said Richard Roe, then and there signed the same as attesting witnesses.

Sworn to and subscribed before me, this.....day
of.....18...

(Signature and title.)²

Where the subscribing witnesses are dead, or out of the state, the instrument may be proved for record by proof of their handwriting.³

¹ *Gardner v. Moore*, 51 Ga. 268. Interest does not ordinarily disqualify the witness. *Welch v. Lewis*, 71 Ga. 387; *Wardlaw v. Mayer*, 77 Ga. 620; but an agency for one of the parties appearing on the face of the instrument disqualifies the witness who is such agent. *Nichols v. Hampton*, 46 Ga. 253.

² Code, §2707; *Rushing v. Shield*, 11 Ga. 636; s. c. 56 Am. Dec. 436; *Eaton v. Freeman*, 63 Ga. 538; and see also, *Janes v. Penny*, 76 Ga. 797; *Hearne v. Smith*, 59 Ga. 704; *Williamson v. Moon*, 68 Ga. 535.

³ Code, §2708.

§327. Chattel Mortgages are to be recorded within thirty days in the county where the mortgagor resides at the time, and also in the county where the property is sit-

uated. If property that has been mortgaged in another state be brought within the State of Georgia, such existing mortgage must be recorded in the proper county within six months after the property is so brought in. The renewal of an unrecorded mortgage creates no lien except as against the mortgagor and persons with actual notice, until recorded.¹

¹ Code, §1956. If the mortgagor is a non-resident, the record is to be made in the county where the property is. *Id.* See *Hardaway v. Semmes*, 24 Ga. 305; s. c. 38 Ala. 557; *Stewart v. Jaques*, 77 Ga. 365; s. c. 4 Am. St. Rep. 86; 3 S. E. Repr. 283; *Cohen v. Chandler*, 79 Ga. 427; s. c. 7 S. E. Repr. 160; *Hunt v. Bowen*, 75 Ga. 662; *Hubbard v. Andrews*, 76 Ga. 177; *Nichols v. Hampton*, 46 Ga. 253; *Douglass v. McCracken*, 52 Ga. 593.

No acknowledgment is necessary to a chattel mortgage, *Hunt v. Bowen*, *supra*. See as to removal of the property, and re-record, *Peterson v. Kaigler*, 78 Ga. 245.

§328. Personal Property.

Deeds and bills of sale to personalty may be recorded in the office of the clerk of the superior court of the county where the maker resides. Such record being permissive and not compulsory, is not constructive or implied notice to any one; it is otherwise where the law requires the record to be made, and it is properly made.¹ The law requires the record of conditional sales of personal property; and also of marriage contracts and settlements by the husband on the wife—these latter to be recorded within three months after execution, in the county of the husband's residence, or else *bona fide* purchasers, creditors and sureties, without notice, who become such before the actual recording of the same, may proceed against the property.²

¹ Code, §2710.

² Code, §§1955a, 1957, 1969, 2710, 1778; *Tift v. Dunn*, 5 S. E. Repr. 256; *Conder v. Holliman*, 71 Ga. 93.

IDAHO TERRITORY.

§329. Effect of Record.

Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded. The term "conveyance," as used in this chapter, embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or incumbered, or by which the title to any real property may be affected, except wills.¹

¹ Rev. Stats. (1887), §§3001, 3002; *Leland v. Isenbeck*, 1 Idaho, 469. The instrument is notice from the time of its deposit for record. §§2998, 3000. Possession is notice. *Feirbough v. Masterson*, 1 Idaho, 135. As to priority of record. *Hazard v. Cole*, 1 Idaho, 276.

§330. Mortgages, Real and Chattel.

Grants absolute in terms are to be recorded in one set of books and mortgages in another.¹ Mortgages of real estate are to be recorded in the county wherein the property is situated; chattel mortgages in the county where the mortgagor lives, and also in the county where the property is located. An affidavit verifying the mortgage must be recorded with it. A chattel mortgage is not valid, except as between the parties, unless duly recorded, or the mortgagee receives and retains actual possession of the property, as against attaching creditors of the mortgagor. The mortgagee is allowed one day for every twenty miles between his residence and the proper recorder's office for filing his mortgage.²

¹ Rev. Stats., §2999.

² Code, §2997; Rev. Laws, p. 661.

§331. Acknowledgment may be made within the territory anywhere before a justice or clerk of the supreme court, or, when acting within their local jurisdiction, before a judge or clerk of a court of record, county recorder, notary public or justice of the peace.

Without the territory and within the United States, before a judge or clerk of any court of the United States or of any state or territory having a seal, or a commissioner of deeds for Idaho, or any officer authorized by the law of such other state or territory to take acknowledgments.

In foreign countries, before a judge of any court having a seal or any notary public therein, or any minister, commissioner or consul of the United States appointed to reside therein.¹

A seal is requisite only where the officer is required by law to have a seal.² The certificate of single acknowledgment is as follows:

STATE (OR TERRITORY) OF....., }
COUNTY OF..... } ss.

On this.....day of....., in the year of....., before me (here insert name and quality of the officer), personally appeared....., known to me (or proved to me on the oath of.....), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (or they) executed the same.

Given under my hand (and official seal if the officer have a seal) the day and year first in this certificate above written.

(Signature and title.)³

Where the acknowledgment is on behalf of a corporation the certificate must show that the person acknowledging was known to the officer to be the individual whose name is signed as president or secretary thereof, and that he acknowledged the execution of the instrument by him as such officer on behalf of the company, as its act and deed, and in pursuance of the order and resolution of such company directing the instrument to be executed. In the case of a conveyance by an attorney in fact, the certificate must show that such attorney acknowledged that he subscribed the name of the principal thereto as principal, and his own name as attorney in fact.⁴

Rev. Stats., §§2950-2953. Where the acknowledgment is taken by a

justice of the peace and the deed is to be used out of his county, a certificate of magistracy is required. §2963.

² Rev. Stats., §2962. Judgments, patents and notices of location may be recorded without acknowledgment. §§2991-2993.

³ Rev. Stats., §§2955, 2957, 2958.

⁴ Rev. Stats., §§2959, 2961. The statute authorizes suits to correct defective certificates, and to prove instruments for record, and in such cases a copy of the judgment, for the purposes of record, suffices in lieu of a certificate of acknowledgment. §§2971-2973.

§332. Acknowledgments of Married Women.

The certificate of acknowledgment by a married woman must be substantially in the following form:

TERRITORY OF IDAHO, }
COUNTY OF..... } ss.

On this.....day of....., in the year of....., before me (here insert name and quality of the officer), personally appeared....., known to me (or proved to me on the oath of.....) to be the person whose name is subscribed to the within instrument, described as a married woman; and upon an examination without the hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same and that she does not wish to retract such execution.¹

¹ Rev. Stats. (1887), §§2956, 2960. See as to wife's deed of community property, *Ray v. Ray*, 1 Idaho, 566.

§333. Proof by Witnesses.

A conveyance may be proved for record by a subscribing witness, or when all the subscribing witnesses are dead or cannot be had, by evidence of the handwriting of the grantor and of at least one subscribing witness. A subscribing witness making proof must be known or proved to officer, and his proof must show the identity of the grantor, his execution of the conveyance, and that the witness subscribed his own name thereto as a witness thereof. The statute prescribes what shall be the proof of handwriting, and what *data* shall be indorsed by the officer on the certificate.¹

¹ Rev. Stats., §§2964-2969. A power of attorney is to be recorded with the deed made by virtue of it. §2995.

ILLINOIS.

§334. Effect of Record.

All deeds, mortgages and other instruments of writing which are authorized to be recorded shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice until the same shall be filed for record.¹ Witnesses are not required, and while conveyances must be sealed by the grantor, a scrawl will suffice for a seal. In counties having less than sixty thousand inhabitants, the clerk of the circuit court acts as recorder of deeds; in counties having over sixty thousand, a recorder is elected who is designated "Recorder of Deeds."²

¹ Rev. Stats. Ill. (Hurd), p. 277, §30; Cothran's Ann. Stats., ch. 30, §§28-30; *Pry v. Pry*, 109 Ill. 466; *Phillips v. South Park Bank*, 119 Ill. 626; s. c. 10 N. E. Repr. 230; *Erickson v. Rafferty*, 79 Ill. 209; *Keryea v. Berry*, 84 Ill. 600; *Shannon v. Hall*, 72 Ill. 354; s. c. 22 Am. Rep. 146; *Torrence v. Shedd*, 112 Ill. 466; *Paris v. Lewis*, 85 Ill. 597; *Morrison v. Brown*, 83 Ill. 562; *Doolittle v. Cook*, 75 Ill. 354; *St. John v. Conger*, 40 Ill. 537; *Kerfoot v. Cronin*, 105 Ill. 609; *Brookfield v. Goodrich*, 32 Ill. 363; *Heaton v. Prather*, 84 Ill. 330; *Buchanan v. International Bank*, 78 Ill. 500; *Haworth v. Taylor*, 108 Ill. 275.

Possession is notice. *Harris v. McIntyre*, 118 Ill. 275; s. c. 8 N. E. Repr. 182; *Farmer's Bank v. Sperling*, 113 Ill. 273; *Riley v. Quigley*, 50 Ill. 304; s. c. 99 Am. Dec. 576; *Cabeen v. Breckinridge*, 48 Ill. 91; *Jaques v. Lester*, 118 Ill. 246; *White v. White*, 105 Ill. 313; *Clark v. Finlon*, 90 Ill. 245; *Clevinger v. Ross*, 109 Ill. 324.

Actual notice is effectual. *Stokes v. Reilly*, 121 Ill. 166; *Bent v. Coleman*, 89 Ill. 364; s. c. 7 Am. Rep. 366; *Boyd v. Yerkes*, 25 Ill. App. 527; *Rogers v. Wiley*, 14 Ill. 65; s. c. 56 Am. Dec. 491; *Chicago v. Witt*, 75 Ill. 211; *McCagg v. Heacock*, 34 Ill. 476; s. c. 85 Am. Dec. 327; *Morrison v. Kelly*, 22 Ill. 610; s. c. 74 Am. Dec. 169; *McCormack v. Wheeler*, 36 Ill. 114.

² Hurd, 970. The entry upon the land book in the county clerk's office of lands sold by the United States does not charge constructive notice, as such entry is only for the purpose of taxation. *Betser v. Rankin*, 77 Ill. 289. A probate court decree for sale of land, and order confirming sale, does not charge constructive notice of the unrecorded administrator's deed. *Anthony v. Wheeler* (Ill.), 22 N. E. Repr. 494.

§334a. Mortgages are executed, acknowledged and recorded in the same manner as deeds, except that they are

recorded in separate books.¹ The wife or husband, as the case may be, must join in order to bar dower, except in mortgages to secure purchase money.² Assignments of mortgages are embraced among the instruments authorized to be recorded.³

¹ Cothran's Stats., ch. 115, §9. The record of a deed absolute in terms but in reality a mortgage, held to protect the rights of the grantee thereunder. *DeWolf v. Strader*, 26 Ill. 231.

See as to record of mortgages, *Smith v. South Park Bk.*, 119 Ill. 626; *s. c.* 10 N. E. Repr. 230; *Heaton v. Prather*, 84 Ill. 330; *Keohane v. Smith*, 97 Ill. 156; *Trusdale v. Ford*, 37 Ill. 210; *Meacham v. Steele*, 93 Ill. 135; *Fry v. Bank of Ill.*, 11 Ill. 367; *Gardner v. Emerson*, 40 Ill. 296; *McCormack v. Bauer*, 122 Ill. 573; *s. c.* 13 N. E. Repr. 852; *The Int. Bank v. Wilshire*, 103 Ill. 149; *Ogle v. Turpin*, 102 Ill. 148; *Smith v. Keohane*, 6 Bradw. 585; *Beaver v. Slanker*, 94 Ill. 175.

² Cothran's Stats., ch. 30, §17. Dower is not released by a conveyance made by an order of court, unless it is so specified therein. Cothran's Stats., ch. 41, §45.

See as to record and priority of purchase money mortgages: *Curtis v. Root*, 20 Ill. 53; *Austin v. Underwood*, 37 Ill. 478; *Roane v. Baker*, 120 Ill. 308; *s. c.* 1 N. E. Repr. 246.

As to creditors and purchasers under the recording acts: *City Nat. Bk. v. Dayton*, 116 Ill. 257; *Massey v. Westcott*, 40 Ill. 160; *Brown v. Welsh*, 18 Ill. 343; *s. c.* 68 Am. Dec. 549; *Schultze v. Houfes*, 96 Ill. 335; *Baldwin v. Sager*, 70 Ill. 503; *Roseman v. Miller*, 84 Ill. 297; *Partridge v. Chapman*, 81 Ill. 137; *Metropolitan Bk. v. Godfrey*, 23 Ill. 579; *Sargent v. Howe*, 21 Ill. 148; *Guiteau v. Wisely*, 47 Ill. 433; *Martin v. Dryden*, 1 Giln. 187; *McFadden v. Worthington*, 45 Ill. 362.

³ *McCormack v. Bauer*, 122 Ill. 573; *s. c.* 13 N. E. Repr. 852; 11 West. Repr. 744; *The Int. Bank v. Wilshire*, 103 Ill. 143, 149.

Deposit of a conveyance with a person in charge of the office sufficient, though he be not the recording officer. *Cook v. Hall*, 1 Giln. 575. If the instrument, after being filed, is withdrawn before it is recorded, the effect of filing is destroyed. *Worcester Bk. v. Cheney*, 87 Ill. 602. Recording without the knowledge of the grantee is not equivalent to delivery. *Herbert v. Herbert*, Breese, 354; *s. c.* 12 Am. Dec. 192. See as to record, *Robbins v. Moore*, 21 N. E. Repr. 934; *Sawyer v. Campbell*, 22 N. E. Repr. 453.

§335. Acknowledgment is not necessary to constructive notice by the record, but a conveyance is not admissible in evidence as a recorded instrument, unless it has been registered upon due acknowledgment.¹ Acknowledgments may be taken within the state by a notary public, United States commissioner who shall affix his seal, a master in chancery,

circuit or county clerk, or any court of record having a seal, or any judge, justice or clerk thereof.²

Without the state and within the United States, before a justice of the peace duly certified as such, notary public, United States commissioner, commissioner of deeds; mayor of a city or clerk of a county, such officer affixing his official seal; any judge or clerk of any United States, state or territorial Court; or by any officer authorized to take acknowledgment by the law of the state where taken.³

In foreign countries, before any court having a seal; a mayor or chief officer of any city or town having a seal; minister or secretary of legation or consul of the United States; or any officer authorized by the foreign law to take acknowledgments.⁴ Officers must use their official seals. When the acknowledgment is taken by a commissioner of deeds for Illinois, the certificate must comply with the law of Illinois. The wife need not be examined separately.⁵ Where the homestead is conveyed, the certificate of acknowledgment should contain a clause showing that the grantors intended to release the homestead right. The form of joint certificate, with waiver of homestead, is as follows:

STATE OF..... }
COUNTY OF..... }

I (name and title of officer) do hereby certify that....
....and.....his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as having executed the same, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and official seal, this.....day of....., A. D. 18...

[SEAL.]

(Signature and title.)

¹ Cothran's Stats., ch. 30, §20; Hurd's Rev. Stats., p. 277, §31; Carpenter v. Dexter, 8 Wall. (75 U. S.), 513; Beaver v. Slanker, 94 Ill. 175;

Fitzgerald v. Fitzgerald, 100 Ill. 385; Washburn v. Roesch, 13 Ill. App. 268; Lickman v. Harding, 65 Ill. 505; Russell v. Baptist Union, 73 Ill. 337; Livingston v. Kettelle, 1 Gilm. 116; s. c. 41 Am. Dec. 166; Becker v. Quigg, 54 Ill. 390.

A party having a direct interest in the deed cannot take acknowledgment of it. West v. Krebaum, 88 Ill. 263; as that of a trustee, Darst v. Gale, 83 Ill. 736. The certificate must show the official character of the officer. Hardin v. Kirk, 49 Ill. 153; s. c. 95 Am. Dec. 579. The mayor of a city is authorized to take acknowledgment, but this does not confer such authority upon the mayor of a town. Dundy v. Chambers, 23 Ill. 369.

The officer must certify to the identity of the grantor. Tully v. Davis, 30 Ill. 103; Shepherd v. Carriel, 19 Ill. 313; Honore v. Wilshire, 109 Ill. 103. See further as to acknowledgments: Hartshorn v. Dawson, 79 Ill. 108; Coburn v. Herrington, 114 Ill. 104; Chester v. Rumsey, 26 Ill. 97; Patterson v. Lawrence, 90 Ill. 174; Grove v. Cather, 23 Ill. 634; s. c. 76 Am. Dec. 711; Lindley v. Smith, 46 Ill. 523; Danner v. Berthold, 11 Ill. App. 351.

² The official character of a justice of the peace, if he be without the county where the land lies, must be certified by the clerk of the county court; and where the acknowledgment is before a court of record or clerk thereof, the seal of court must be affixed. Grand Tower Co. v. Gill, 111 Ill. 541.

³ See Grand Tower Co. v. Gill, *supra*. Where the acknowledgment is made in conformity with the law of another state where taken, a certificate of conformity is required from the clerk of a court of record, under seal of the court; or conformity may be proved by the laws of such state.

⁴ Cothran's Stat., ch. 30, §20; Hurd's Rev. Stats. (1885), ch. 30, §22; Edward v. Flanagan, 104 U. S. 562; Strauch v. Hathaway, 101 Ill. 11; s. c. 40 Am. Rep. 193. Where the officer taking a foreign acknowledgment does not use an official seal, a certificate of magistracy or conformity is required. *Id.* Phillips v. People, 11 Ill. App. 340.

⁵ Rev. Stats., ch. 30, §19; Bradshaw v. Atkins, 110 Ill. 323, 329. Formerly required, see Morrison v. Brown, 83 Ill. 562; Merritt v. Yeates, 71 Ill. 639; s. c. 22 Am. Rep. 128; Warrick v. Hull, 103 Ill. 280; Mariner v. Saunders, 5 Gilm. 113; Mason v. Brock, 12 Ill. 273; s. c. 52 Am. Dec. 490; Hughes v. Lane, 11 Ill. 123; s. c. 50 Am. Dec. 436. Where the husband does not join, the deed of the wife alone is not binding on her, unless duly acknowledged before the proper officer. Snell v. Snell, 123 Ill. 403.

§336. Proof by Witnesses.

Proof for record may be made by a subscribing witness, and when the grantor and the subscribing witness are dead, the officer may take proof of their handwriting; or of that of the grantor, if there be no subscribing witnesses. The certificate of proof by a subscribing witness is as follows:

STATE OF..... }
 COUNTY OF..... }

Be it remembered that on this.....day of....., A. D., 18.., before me (name and title of officer) duly appointed and commissioned, personally appeared A. B., to me personally known to be a subscribing witness to the foregoing deed (or as the case may be, who was proved to me on oath of C. D., a credible witness, to be a subscribing witness to the foregoing deed), who, after being duly sworn according to law, deposeth and saith that John Doe, whose name appears subscribed to said deed, is the real person who executed the same, and that he, the said A. B., subscribed his name as a witness thereto in the presence and at the request of the said John Doe, which is sufficient evidence to me of the execution of said deed.

In witness whereof, I have hereunto set my hand and seal, at.....this.....day of....., A. D. 18..

[SEAL.]

(Signature and title.)

The certificate when the grantor and subscribing witness are dead or cannot be produced, may be thus:

STATE OF..... }
 COUNTY OF..... }

Be it remembered that on this.....day of....., A. D. 18.., before me (name and title of officer), personally appeared A. B., a competent and credible witness, who being duly sworn according to law, deposeth and saith that he personally knew the handwriting of John Doe, the grantor in, and of C. D., the subscribing witness to, the foregoing deed, and that he well knew the signature of each of them, having frequently seen them write (or such other means of knowledge as the witness may have), and that he believes the name of such grantor and subscribing witness to the deed aforesaid were thereto subscribed by the said John Doe, the grantor, and C. D., the subscribing witness, respectively, which to me affords sufficient evidence of the due execution of said deed.

In witness whereof I have hereunto set my hand and seal,
at.....this.....day of....., A. D. 18...

[SEAL.]

(Signature and title.)¹

Starr & Curtiss's Stats., ch. 30, §25; Stebbins v. Duncan, 108 U. S. 32.

§337. Chattel Mortgages.

A chattel mortgage or lien upon personal property is not valid against the rights of any third person unless possession of the property be delivered, or the instrument be acknowledged and recorded and provide that possession may remain with the grantor. The acknowledgment may be made before a justice of the peace of the town or district where the mortgagor resides, or in case of a non-resident of the state, before any officer authorized to take the acknowledgment of deeds.¹ The justice is required in case of an acknowledgment by a resident of the state, to enter a memorandum thereof in his docket.² Chattel mortgages are to be recorded in the county where the mortgagor resides at the time, or if a non-resident of the state, in the county where the property is situated, and the record is good for a period of two years.³

¹ Starr & Curtiss's Stats., ch. 95, §§1-5; Ticknor v. McClelland, 84 Ill. 471. This (name of instrument) was acknowledged before me by (name of grantor), (when the party making the acknowledgment is a resident, insert the words) and entered by me this.....day of.....18... Witness my hand and seal.

(Name of officer and seal.)

² Koplin v. Anderson, 88 Ill. 120; Pike v. Colvin, 67 Ill. 227; Harvey v. Dunn, 89 Ill. 585; Harlow v. Birger, 30 Ill. 425; *ante*, §246.

³ Sword v. Law, 122 Ill. 487; s. c. 13 N. E. Repr. 826. Actual notice of no effect. Blatchford v. Boyden, 122 Ill. 657; s. c. 13 N. E. Repr. 801; McDowell v. Stewart, 83 Ill. 538; *ante*, §246. See as to record of chattel mortgages: Chipron v. Feikert, 68 Ill. 284; Beach v. Derby, 19 Ill. 617; People v. Hamilton, 17 Ill. App. 599; Gregg v. Sanford, 24 Ill. 17; s. c. 76 Am. Dec. 725.

As to personal property and conditional sales: Fawcett v. Osborn, 32 Ill. 411; s. c. 83 Am. Dec. 278; Jennings v. Gage, 13 Ill. 610; s. c. 56 Am. Rep. 476; Young v. Bradley, 68 Ill. 553; Newkirk v. Dalton, 27 Ill. 413.

INDIANA.

§338. Effect and Time of Record.

Conveyances, except leases of less than three years, to be valid against any other than the grantor, his heirs, or those having notice thereof, must be recorded in the recorder's office of the county where the land is situated within forty-five days from their execution.¹ The recorder is required to note, in a book kept for that purpose, the names of the parties to the instrument, a description of the lands and the date of its reception, and a conveyance is considered as recorded from the time of such noting.² Seals are not required, and witnesses are not necessary to a conveyance if it be acknowledged.

¹ Rev. Stats. Ind. (1888), §2931; *Gibson v. Keyes*, 112 Ind. 568; s. c. 14 N. E. Repr. 591; 12 West. Repr. 182; *Wilson v. Hunter*, 30 Ind. 466; *Corbin v. Sullivan*, 47 Ind. 356; *Wood v. Lordier*, 18 N. E. Repr. 34; *Hyatt v. Cochran*, 69 Ind. 436; *Trentman v. Eldridge*, 98 Ind. 525; *Wright v. Shepherd*, 47 Ind. 176; *Lane v. Schlemmer*, 114 Ind. 296; s. c. 5 Am. St. Rep. 621; 15 N. E. Repr. 454; *Walter v. Hartwig*, 106 Ind. 123; s. c. 6 N. E. Repr. 5; *Brannon v. May*, 42 Ind. 92; *Faulkner v. Overturf*, 49 Ind. 265.

Actual notice supplies the want of registry. *Petry v. Ambrosher*, 100 Ind. 510; *Crassen v. Swoveland*, 22 Ind. 427; *White v. Fisher*, 77 Ind. 65; s. c. 40 Am. Rep. 287; *Peckham v. Hendren*, 76 Ind. 47; *Strohm v. Good*, 113 Ind. 93; s. c. 14 N. E. Repr. 901; *Walter v. Hartwig*, 106 Ind. 123.

Possession is notice. *Barnes v. Union School Township*, 91 Ind. 301; *Sutton v. Jervis*, 31 Ind. 265; s. c. 99 Am. Dec. 631; *Chicago v. Hay*, 119 Ind. 493; *Campbell v. Indianapolis Ry. Co.*, 110 Ind. 490; s. c. 11 N. E. Repr. 482; *Peterson v. McCullough*, 50 Ind. 35.

² Rev. Stats. (1888), §2951; *Quick v. Milligan*, 108 Ind. 409; s. c. 58 Am. Rep. 49; 9 N. E. Repr. 392; *The Conn. Ins. Co. v. Talbot*, 113 Ind. 373; s. c. 3 Am. St. Rep. 655; 14 N. E. Repr. 586; *Woodbury v. Fisher*, 20 Ind. 357; *Fitzgerald v. Goff*, 99 Ind. 28; *Case v. Burnstead*, 24 Ind. 429.

§339. Mortgages.

When a mortgage is in the form of an absolute conveyance, but is intended to be defeasible by force of a deed, defeasance bond, or other instrument for that purpose, the original conveyance is not defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless the defeasance is recorded within ninety days after the date of the deed.¹ Mortgages may be discharged by an en-

try of satisfaction on the margin of the record, or by the record of a certificate of payment duly acknowledged.² Assignments of mortgages should be recorded, and after such entry is made of record, the mortgagor and all other persons shall be bound thereby; and the same shall be deemed a public record.³ And a release of record presumptively destroys the mortgage lien, and notice of continued existence of the debt is not notice of continued existence of the mortgage.⁴

¹ Rev. Stats. (1888), §2932; *Gabbert v. Schwartz*, 69 Ind. 450; *Houston v. Houston*, 67 Ind. 276; *Stockwell v. Stockwell*, 101 Ind. 1; *Singer v. Scheible*, 109 Ind. 575; s. c. 10 N. E. Repr. 616; *Burke v. Abbott*, 103 Ind. 1; s. c. 57 Am. Rep. 474; *Cain v. Hanna*, 63 Ind. 408; *Reasoner v. Edmundson*, 5 Ind. 393. Record after the time prescribed is notice from the time it is made. *Gilchrist v. Gough*, 63 Ind. 576; s. c. 30 Am. Rep. 250.

But this statute does not apply to a volunteer as against the rightful owner, even though the defeasance be not recorded. *Wilson v. Wilson*, 86 Ind. 472.

² Rev. Stats. (1888), §§1090, 1091; *Richards v. McPherson*, 74 Ind. 158; *Storey v. Krewson*, 55 Ind. 397; *Reeves v. Hays*, 95 Ind. 521.

As to creditors and purchasers, see *Rosser v. Bingham*, 17 Ind. 544; *Orth v. Jennings*, 8 Blackf. 420; *Hunsinger v. Hoffer*, 110 Ind. 390; s. c. 11 N. E. Repr. 463; 9 West. Repr. 46; *Dixon v. Hunter*, 57 Ind. 278; *Runyan v. McClelland*, 24 Ind. 175; *post*, §342, note 3.

³ Rev. Stats., §1093; *The Conn. Ins. Co. v. Talbot*, 113 Ind. 373; s. c. 3 Am. St. Rep. 655; 14 N. E. Repr. 586.

⁴ *Farmer's Bank, etc., v. Butterfield*, 100 Ind. 229.

§340. Acknowledgment may be made within the state before a judge or clerk of a court of record, justice of the peace, auditor, recorder, notary public, mayor of a city, or county surveyor. ^a

Without the state and within the United States, before a judge or clerk of a court of record, justice of the peace, auditor, recorder, notary public, mayor of a city, or commissioner of deeds for Indiana.

In foreign countries, before a minister, *chargé d'affaires* or consul of the United States.¹ Officers having a seal must attest their certificates therewith, and in such case no further attestation is necessary.² But where the officer

has no seal, the acknowledgment shall be certified by the clerk of the circuit court of the county where the officer resides, and attested by the seal of said court. The husband must join in a conveyance of the wife's separate property; but a married woman's acknowledgment is taken as though she were single, no separate examination being necessary.³ The form of a joint certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

Be it remembered that on this.....day of....., A. D. 18.., before me (name and title of officer), duly commissioned and qualified, personally appeared....., and, his wife, the grantors in the foregoing deed, and severally acknowledged the execution of the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[SEAL.]

(Signature and title.)⁴

¹ Rev. Stats. (1888), §2933; *Walter v. Hartwig*, 106 Ind. 123; s. c. 6 N. E. Repr. 5; *Muncie Nat. Bk. v. Brown*, 112 Ind. 474; s. c. 14 N. E. Repr. 358; *Mullis v. Cavins*, 5 Blackf. 77; *Schofield v. Jennings*, 68 Ind. 232; *Owen v. Norris*, 5 Blackf. 479; *Lane v. Schlemmer*, 114 Ind. 296; s. c. 5 Am. St. Rep. 621; 15 N. E. Repr. 454; *Stoll v. Harrison*, 73 Ind. 20; *Wright v. Bundy*, 11 Ind. 398; *Cole v. Wright*, 70 Ind. 179.

² Rev. Stats. (1888), §§2933, 2950, 2999. Where the officer is not required by law to have a seal, the certificate is sufficient without it. *Cole v. Wright*, 70 Ind. 179; and see *Muncie Nat. Bk. v. Brown*, 112 Ind. 474; s. c. 14 N. E. Repr. 358; 12 West. Repr. 157.

³ For decisions under the earlier laws, see *Fleming v. Potter*, 14 Ind. 486; *Stevens v. Doe*, 6 Blackf. 475; *Jordan v. Corey*, 2 Ind. 385; s. c. 52 Am. Dec. 517.

⁴ Rev. Stats. (1888), §2947. A certificate of acknowledgment made on the assurance of another person that the grantor executed the instrument is invalid. *Mays v. Hedges*, 79 Ind. 288.

§341. Proof by Witness.

Witnesses are not required where the instrument is acknowledged. Proof for record may be made by a subscribing witness before any of the officers above named, and the certificate thereof may be as follows:

STATE OF..... }
 COUNTY OF..... }

Be it remembered, that on this.....day of....., A. D. 18.., before me, the undersigned (name and title of officer), personally appeared J. H. Peters, the subscribing witness to the execution of the within deed, of lawful age, who, being by me duly sworn, upon his oath did depose and say that on the.....day of....., 18.., he saw the within named grantors....., and....., his wife, sign, seal and deliver the within deed as their act and deed; that this deponent at the same time signed his name as a witness of the execution of said deed, at the request and in the presence of said grantors, which grantors were at the time over the age of twenty-one years, and of sound mind and memory, and laboring under no disability so far as deponent knows.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[SEAL.]

(Signature and title.)¹

¹ Rev. Stats. (1888), §2936.

§342. Chattel Mortgages.

A chattel mortgage is not effectual against other persons than the parties thereto, except in case of possession of the property taken and retained, unless acknowledged and recorded, as in case of deeds, in the county where the mortgagor resides, within ten days after the execution thereof.¹ Unless accompanied by immediate delivery and followed by actual change of possession, the mortgage is presumed to be fraudulent and void as against creditors of the vendor, or subsequent purchasers in good faith, unless it be made to appear that the sale was made without intent to defraud such creditors and purchasers. The mortgage is considered as recorded from the time it is left for that purpose at the proper recorder's office.² Chattel mortgages are not required to be renewed. They may be discharged

of record in the same manner as mortgages of realty. When silent as to possession, the mortgagee is entitled to immediate possession upon execution of the mortgage.³

¹ Rev. Stats. (1888), §4913; *Granger v. Adams*, 90 Ind. 87; *McTaggart v. Rose*, 14 Ind. 230; *Wright v. Bundy*, 11 Ind. 398; *Duke v. Strickland*, 43 Ind. 494; *Hackleman v. Goodman*, 75 Ind. 202; *Lockwood v. Slevin*, 26 Ind. 125; *Matlock v. Straughn*, 21 Ind. 128; *Hasselman v. McKernan*, 50 Ind. 441; *Ames Iron Works v. Warren*, 76 Ind. 512; *s. c.* 40 Am. Rep. 258.

The ten days are reckoned from the execution, not the date, of the instrument. The *prima facie* presumption, however, is that it was fully executed and delivered at its date. *Briggs v. Fleming*, 112 Ind. 313; *s. c.* 14 N. E. Repr. 86; *Stonebreaker v. Kerr*, 40 Ind. 186; *Hoadley v. Hadley*, 48 Ind. 452.

² As the statute does not require the recorder to note the time of receiving the instrument, such time may be proved by parol. *Holman v. Doran*, 56 Ind. 358.

³ *Broadhead v. McKay*, 46 Ind. 495. See as to personal property and conditional sales, *Hodgson v. Warner*, 60 Ind. 214; *Bradshaw v. Warner*, 54 Ind. 58; *Dunbar v. Rawles*, 28 Ind. 225; *s. c.* 92 Am. Dec. 211; *Baals v. Stewart*, 109 Ind. 371; *s. c.* 9 N. E. Repr. 403; *Winchester v. Carman*, 109 Ind. 31.

The statute provides for a "*lis pendens* record," to be kept in the clerk's office in each county, whereon notice must be given of the filing of suits, and of execution and attachment levies on real estate, and of the dismissal, satisfaction, etc., thereof. Rev. Stats., §324, *et seq.*

Alien Landowners. Aliens who have not declared their intention of becoming citizens, may not hold land unless they receive it by devise or descent, and in that event they may hold it for five years only. Land held beyond 5 years shall escheat to the state. But the holder of a lien upon or interest in real estate may take title to the land on which he holds such lien. *Elliott's Sup.* 668-670; Act March 9, 1885.

Power of Attorney. Deeds and like instruments may be executed by attorney in fact. But the power of attorney must be formal and must be placed of record before the recorder is authorized to receive for record any instrument executed by such attorney in fact. (*Elliott's Sup.* 672, 673. But a power of attorney is valid as between the parties, though not recorded. *Caley v. Morgan*, 114 Ind. 350.

Vendor's Lien. Vendor's lien may be reserved in the deed. But vendor may be required to satisfy the same of record on its payment to him. *Elliott's Sup.* 683, 684; Act March 9, 1889.

In the late case of *Shirk v. Thomas* (Ind.), 22 N. E. Repr. 976, it is held that a judgment creditor is not protected by the registry statute (§2931) against an unrecorded conveyance. This overrules the below cases holding that a judgment creditor who purchases at his own sale is a *bona fide* purchaser. 114 Ind. 115; 100 Ind. 510; 93 Ind. 431; 26 Ind. 319; 102 Ind. 221; 64 Ind. 382; 105 Ind. 237; 76 Ind. 17; 109 Ind. 165; 80 Ind. 527; 102 Ind. 524; 103 Ind. 404; 75 Ind. 571, and 86 Ind. 127.

§343. Effect of Record.

No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice unless recorded in the office of the recorder of the county in which the land lies.¹ The recorder must note, in a book for that purpose, the time when the instrument was filed, its date, nature and the names of the parties to it, and the book or page where it is recorded, and description of land conveyed, and from that time such entries shall furnish constructive notice.² Conveyances of or affecting city and town lots are recorded in a separate set of books.³ The county auditor keeps for purposes of taxation a set of transfer and index books, and a deed cannot be filed for record by the recorder until the proper entries have been made upon the transfer books in the auditor's office and indorsed upon the deed.⁴ Levies of attachment on real estate are not notice until entered in the "incumbrance book" kept in the clerk's office in each county—such entry to be signed by the sheriff.⁵

¹ Code of Iowa (1888), §3112; Miller's Code (1880), §1941; *Greenwood v. Jenswold*, 69 Iowa, 53; s. c. 28 N. W. Repr. 433; *Dean v. Scott*, 67 Iowa, 233; s. c. 25 N. W. Repr. 147; *Raymond v. Morrison*, 59 Iowa, 371; *Pastel v. Palmer*, 71 Iowa, 157; s. c. 32 N. W. Repr. 257; *Moody v. Dryden*, 72 Iowa, 461; *Switzer v. Knapps*, 10 Iowa, 72; s. c. 74 Am. Dec. 375; *Disque v. Wright*, 49 Iowa, 538; *Holloway v. Platner*, 20 Iowa, 121; s. c. 89 Am. Dec. 517; *Richardson v. Henry*, 40 N. W. Repr. 115; *Willard v. Cramer*, 36 Iowa, 22; *Steward v. Huff*, 19 Iowa, 557; *Gower v. Doheney*, 33 Iowa, 36.

Actual notice supplies registry. *Allen v. McCalla*, 25 Iowa, 464; s. c. 96 Am. Dec. 56; *Young v. Shauer*, 73 Iowa, 555; s. c. 5 Am. St. Rep. 701; 35 N. W. Repr. 629; *Bell v. Thomas*, 2 Iowa, 384; *Ormsby v. Budd*, 72 *Id.* 80; s. c. 33 N. W. Repr. 457; *Walker v. Schreiber*, 47 Iowa, 529; *Davis v. Lutkeweis*, 72 *Id.* 254; s. c. 33 N. W. Repr. 670.

² Code (1888), §§3114-3117; *Jones v. Berkshire*, 15 Iowa, 248; s. c. 83 Am. Dec. 412.

Possession is notice. *Moore v. Pierson*, 6 Iowa, 279; s. c. 71 Am. Dec. 409; *Koon v. Trammell*, 71 Iowa, 132; s. c. 32 N. W. Repr. 243; *Sprague v. White*, 73 Iowa, 670; *Wrede v. Cloud*, 52 Iowa, 371; *Robinson v. Lake*, 14 *Id.* 424; *McCleerey v. Wakefield*, 41 N. W. Repr. 210; *Gardner v. Earley*, 72 Iowa, 518; s. c. 34 N. W. Repr. 311; *Buck v. Holt*, 74 Iowa, 37; s. c. 37 N. W. Repr. 377.

Effect of record. *Sowden v. Craig*, 26 Iowa, 156; s. c. 99 Am. Dec. 125; *Dillon v. Shugar*, 73 Iowa, 35; s. c. 35 N. W. Repr. 509; *Stewart v. Huff*, 19 Iowa, 557; *Benjamin v. Davis*, 73 Iowa, 715; s. c. 36 N. W. Repr. 717; *Bradford v. Miller*, 12 Iowa, 14; *Dargin v. Becker*, 10 *Id.* 571; *Hume v. Franzen*, 73 *Id.* 25. Record as delivery: *Hinson v. Bailey*, 73 Iowa, 544; s. c. 5 Am. St. Rep. 700; 35 N. W. Repr. 626; *Nat. Bk. v. Morse*, 73 Iowa, 174; s. c. 5 Am. St. Rep. 670; 34 N. W. Repr. 803. Recorded deed in evidence: *Mixer v. Beunett*, 70 Iowa, 329; s. c. 30 N. W. Repr. 587.

³ Code (1888), §3118. See as to record of plats: *Manderschid v. Du- buque*, 29 Iowa, 73; *Stewart v. Huff*, 19 Iowa, 557.

⁴ Code (1888), §§3121-3127. Index: *Barney v. McCarty*, 15 Iowa, 510; s. c. 83 Am. Dec. 427; *Breed v. Conley*, 14 Iowa, 269; s. c. 81 Am. Dec. 485; *ante*, §142; *Peters v. Ham*, 62 Iowa, 656; s. c. 18 N. W. Repr. 296; *Howe v. Thayer*, 49 Iowa, 154; *Noyes v. Horr*, 13 *Id.* 57.

⁵ Code (1888), §4247; *Benjamin v. Davis*, 73 Iowa, 715; s. c. 36 N. W. Repr. 717.

§343a. **Mortgages of Realty** are acknowledged and recorded in the same manner as deeds.¹ It is not necessary for the wife to join in a mortgage given for purchase money.² The vendor's lien, unless reserved in the deed, or by mortgage, is not good against a subsequent purchaser of the property.³ In the absence of stipulations to the contrary, the mortgagor of real property retains the legal title and the right of possession thereto.⁴ Deeds of trust are declared subject to the law of mortgages.⁵ Assignments of mortgages are held to be within the recording acts,⁶ and a junior mortgagee is by statute accorded the right, upon paying a prior mortgage, to have assigned to him all the interest of the holder of such prior mortgage.⁷ Mortgages by railroad corporations are to be executed in such manner as the articles of incorporation or by-laws may provide; are to be recorded in each county through which the railway may run, or in which any of the mortgaged property is situate; and may include personal property and rolling stock as part of the road—the record being notice both as to the real and personal property.⁸ Mortgages are discharged of record by the mortgagee or those legally acting for him acknowledging satisfaction thereof in the margin

of the record; or the discharge may be by a satisfaction piece duly acknowledged and recorded. In case of foreclosure, it is made the duty of the clerk of the court to enter satisfaction of the mortgage. Failure of the mortgagee, for sixty days after request, to enter satisfaction, renders him liable to a forfeit of twenty-five dollars.⁹

¹ Seevers v. Delashmut, 11 Iowa, 174; s. c. 77 Am. Dec. 179; Kuhn v. Graves, 9 Iowa, 305; Carnog v. Fuller, 30 *Id.* 212; Davis v. Lutke-
weis, 72 Iowa, 254; s. c. 33 N. W. Repr. 670; Koevenig v. Schmitz, 71
Iowa, 175; s. c. 32 N. W. 320.

² See as to record of purchase money mortgages: Clark v. Holland,
72 Iowa, 34; s. c. 34 N. W. Repr. 350; Koevenig v. Schmitz, *supra*;
Phelps v. Fockler, 61 Iowa, 340; Kaiser v. Leinbeck, 3 *Id.* 520.

³ Code (1888), §3111; Prouty v. Clark, 73 Iowa, 55; s. c. 34 N. W.
Repr. 614.

⁴ Code (1888), §3109. It is otherwise as to personal property: §3098.

⁵ Code (1888), §4554. As to priority in the record of mortgages, see
Powers v. Laffer, 73 Iowa, 283; English v. Waples, 13 *Id.* 57; Sims v.
Hammond, 33 *Id.* 368; Vandercook v. Baker, 48 *Id.* 199; Clark v. Bal-
lard, 61 *Id.* 747; Council Bluffs v. Billups, 67 *Id.* 674; Mather v. Jens-
wold, 72 *Id.* 550; Warner v. Waterloo, 62 *Id.* 699; s. c. 14 N. W. Repr.
334; Thorpe v. Durbin, 45 Iowa, 192.

⁶ Bowling v. Cook, 39 Iowa, 200; Parmenter v. Oakley, 69 Iowa, 388;
s. c. 32 N. W. Repr. 653; Clark v. Holland, 72 Iowa, 34; s. c. 33 N. W.
Repr. 358.

⁷ Code (1888), §4559. As to creditors and purchasers generally, un-
der the recording acts, see Fords v. Vance, 17 Iowa, 194; Ryan v. Chew,
13 *Id.* 589; Trustees v. Hill, 12 *Id.* 462; First Nat. Bank v. Hayzlitt, 40
Id. 659; Norton v. Williams, 9 *Id.* 528; Evans v. McGlasson, 18 *Id.* 150;
Hoy v. Allen, 27 *Id.* 208; Port v. Embree, 54 *Id.* 14; Welton v. Tizzard,
15 *Id.* 495; Moorman v. Gibbs, 39 N. W. Repr. 832; Holloway v. Platner,
20 Iowa, 121; s. c. 89 Am. Dec. 517; Updegraff v. Edwards, 45 Iowa,
513; Kitteridge v. Chapman, 36 *Id.* 348; Rush v. Mitchell, 71 *Id.* 333; s.
c. 33 N. W. Repr. 367.

⁸ Code (1888), §§1965-1967.

⁹ Code (1888), §§4563, 4564; Huff v. Farwell, 67 Iowa, 298; s. c. 25
N. W. Repr. 252; Foster v. Paine, 63 Iowa, 85; s. c. 18 N. W. Repr. 699;
Hoffman v. Wilhelm, 68 Iowa, 510; s. c. 27 N. W. Repr. 483; Bruce v.
Nelson, 35 Iowa, 157; Bank v. Anderson, 14 *Id.* 544; Daws v. Craig, 62
Id. 515; Mather v. Jenswold, 72 Iowa, 150; s. c. 550; s. c. 34 N. W.
Repr. 327; Brayley v. Ellis, 71 Iowa, 155; s. c. 32 N. W. Repr. 254.

§344. Acknowledgment or proof for record is required.¹
It may be made within the state before any court having a
seal, or judge or clerk thereof, or justice of the peace or
notary public, or county auditor or his deputy.

Without the state and within the United States, before any court of record or officer holding the seal thereof, commissioner of deeds for Iowa, notary public or justice of the peace.²

In foreign countries, before any ambassador, minister, secretary of legation, consul, *chargé d'affaires*, consular agent, or any other officer of the United States in any foreign country who is authorized to issue certificates under the seal of the United States, or any officer of a foreign country authorized by its laws to certify acknowledgments.³

The acknowledgment of a married woman is taken as though she were single. She may make contracts and conveyances of and affecting her separate property as if she were *sole*; and her joinder with her husband in a conveyance of his real estate is deemed sufficient to pass all her interest, either as his wife, or in her own right.⁴ The form of joint certificate is as follows:

STATE OF..... }
COUNTY OF..... }

On this.....day of....., A. D. 18..., before me (title of the court or officer), personally came A. B., and C. B., his wife, to me personally known to be the identical persons whose names are affixed to the above deed as grantors, and acknowledged the execution of the same to be their voluntary act and deed.

Witness my hand and notarial (or other seal of office) seal, the day and year above written.

[SEAL.]

(Signature and title.)⁵

Code (1888), §3128; *Bailey v. Landingham*, 53 Iowa, 722; *Newman v. Samuels*, 17 *Id.* 528; *Wickersham v. Reeves*, 1 *Id.* 413; *Reynolds v. Kingsbury*, 15 *Id.* 238; *Dussaume v. Barnett*, 5 *Id.* 195; *Abrams v. Erwin*, 9 *Id.* 87; *Stephens v. Williams*, 46 *Id.* 540; *Wilson v. Traer*, 20 *Id.* 233; *Willard v. Cramer*, 39 *Id.* 22; *Greenwood v. Jenswold*, 69 Iowa, 53; s. c. 28 N. W. Repr. 433; *Colby v. McOmber*, 71 Iowa, 469; s. c. 32 N. W. Repr. 459; *Greene v. Scranage*, 19 Iowa, 461; s. c. 87 Am. Dec. 447. A conveyance is good between the parties without acknowledgment. *Morse v. Beale*, 68 Iowa, 463; s. c. 27 N. W. Repr. 461.

² Code (1888), §3129. The certificate of a justice of the peace, made without the state, must be accompanied by a certificate under seal of the

proper authority certifying the official character of the justice, his authority to take such acknowledgment, and the genuineness of his signature. *Id.* Jones v. Berkshire, 15 Iowa, 248; s. c. 83 Am. Dec. 412. As to indexing the record, see cases cited in note 4, section 343, and also *Ætna Life Ins. Co. v. Bishop*, 69 Iowa, 645; s. c. 29 N. W. Repr. 761; Scales v. Wilsey, 11 Iowa, 261; Bostwick v. Powers, 12 Iowa, 456; Hibbard v. Zenor, 39 N. W. Repr. 714.

³ Where the certificate of acknowledgment is made by a foreign officer, it must be authenticated by one of the above named officers of the United States, certifying that full faith and credit is due to the certificate of such foreign officer. §3130.

⁴ Code (1888), §3106. Estates of dower and curtesy abolished. Code (1888) §3644. The widow's interest in real property of her deceased husband, designated by the statute as a distributive share, is a materially different estate from that derived by descent. *Rausch v. Moore*, 48 Iowa, 611; see *Mock v. Watson*, 41 Iowa, 241; *Daugherty v. Daugherty*, 69 Iowa, 677; *Lucas v. Sawyer*, 17 Iowa, 517; *Moore v. Kent*, 37 Iowa, 20; *Parker v. Small*, 55 Iowa, 732; *Foley v. Kane*, 53 Iowa, 64; *Cunningham v. Wilde*, 56 Iowa, 369.

As to her acknowledgment under former laws: *Greene v. Scranage*, *supra*; *Morris v. Sargent*, 18 Iowa, 199; *Jones v. Crossthwaite*, 17 *Id.* 393; *O'Ferral v. Simplot*, 4 *Id.* 381; *Grapengather v. Fejevary*, 9 *Id.* 163; s. c. 74 Am. Dec. 336.

⁵ Code (1888), §3131. The certificate must state the title of the court or officer. *Fogg v. Holcombe*, 64 Iowa, 621; s. c. 21 N. W. Repr. 111; Code, §3131. The certificate of a notary should state of what county he is notary. *Greenwood v. Jenswold*, 69 Iowa, 533; s. c. 28 N. W. Repr. 433; and his name should be engraved on his seal. *Gage v. Dubuque*, 11 Iowa, 310.

For decisions upon the statutes validating acknowledgments and records, see *Goodykootz v. Olsen*, 54 Iowa, 174; *Brinton v. Seever*, 12 *Id.* 389; *East v. Pugh*, 71 *Id.* 162; s. c. 32 N. W. Repr. 309; *Buckley v. Earley*, 72 Iowa, 550; s. c. 33 N. W. Repr. 769; *Arginsinger v. Cline*, 69 Iowa, 435.

§345. Proof by Witnesses.

Where the grantor dies before making acknowledgment, or his attendance cannot be procured, or he refuses to acknowledge the instrument, proof for record may be made by any competent person other than the grantee. The certificate of proof should be as follows:

STATE OF..... }
COUNTY OF..... }

Be it remembered, that on this.....day of,....., A. D. 18.., before me (title of the court or officer), personally appeared C. D., who being by me first duly sworn, did depose and say that A. B., the grantor in foregoing deed,

was personally known to him, and that the said A. B. was dead (or state the reason for his non-attendance), which is satisfactory proof to me that his attendance could not be procured to make this acknowledgment (or state that having appeared he refused to acknowledge the instrument), and the said C. D. further deposes and said that he saw A. B., the grantor therein, subscribe and deliver said deed (or that the said A. B., grantor therein, acknowledged to him that he had subscribed, sealed and executed the said deed) for the uses and purposes therein mentioned, which is satisfactory proof to me that said instrument was executed by said A. B., whose name is thereunto subscribed as a party.

In witness whereof, I have hereunto set my hand and affixed my notarial (or other official seal of office) seal, the day and year aforesaid.

[SEAL.]

(Signature and title.)¹

¹ Code (1888), §§3133, 3136. Omission of "appeared" from the certificate, held to invalidate it. *Scharfenburg v. Bishop*, 35 Iowa, 60.

Where an acknowledgment is by an attorney in fact, the certificate should show that the person signing the instrument was personally known to be the identical person signing the same as attorney in fact for the grantor, and that he acknowledged the instrument to be the act and deed of the grantor, by him as his attorney thereunto appointed, voluntarily done and executed. Code (1888), §§3135, 3136.

§346. Chattel Mortgages.

Where the mortgagor retains actual possession of the property, a chattel mortgage is not valid against existing creditors or subsequent purchasers, without notice, unless the mortgage, duly acknowledged, like conveyances of real estate, is filed for record in the county where the holder of the property resides. The recorder keeps an entry book as in case of real estate, and the mortgage is notice from the time the entries are made therein.¹ Conditional sales are required to be recorded the same as chattel mortgages.² In suits affecting real estate situated in another county, a notice of *lis pendens* must be filed with the district clerk of such other county, in order that the

suit may be constructive notice to subsequent vendees and incumbrancers.³ A claim of mechanic's lien must be filed with the clerk of the district court by a principal contractor within ninety days and sub-contractor within thirty days after the labor has been done or material furnished; but if filed after such times, is good except as against parties whose rights have accrued in good faith without notice after the thirty or ninety days, and before any claim for the lien was filed. Where lien is claimed on a railway the sub-contractor shall have sixty days from the last day of the month in which such labor was done or material furnished, within which to file his claim therefor.⁴

¹ Code (1888), §§3090-3097; *Sowden v. Craig*, 26 Iowa, 156; s. c. 96 Am. Dec. 125; *Wells v. Wilcox*, 68 Iowa, 708; s. c. 28 N. W. Repr. 29; *Warner v. Wilson*, 73 Iowa, 719; s. c. 5 Am. St. Rep. 710; 36 N. W. Repr. 719; *Everett v. Brown*, 64 Iowa, 420; s. c. 20 N. W. Repr. 743; *Cummins v. Tovey*, 39 Iowa, 195; *Hayes v. Wilcox*, 61 Iowa, 732; s. c. 17 N. W. Repr. 110; *Plano Co. v. Griffith*, 39 N. W. Repr. 214; *Hibbard v. Zenor*, 39 N. W. Repr. 714; *Trulock v. Donahoe*, 40 Iowa, 696; *Rhutasel v. Stephens*, 68 *Id.* 627; s. c. 27 N. W. Repr. 786; *Muir v. Blake*, 57 Iowa, 662; s. c. 11 N. W. Repr. 621; *Wheeler v. Becker*, 68 Iowa, 723; *Rowley v. Bartholomew*, 37 *Id.* 374. See as to personal property: *Mowbray v. Cady*, 40 Iowa, 604; *Horsley v. Hairsine*, 41 N. W. Repr. 579; *Bailey v. Harris*, 8 Iowa, 331; s. c. 74 Am. Dec. 312.

² Code (1888), §3093; *Moline Plow Co. v. Braden*, 71 Iowa, 141; s. c. 32 N. W. Repr. 247; *Thorpe v. Fowler*, 57 Iowa, 541; s. c. 11 N. W. Repr. 3; *Moore v. Johnson*, 72 Iowa, 34; s. c. 34 N. W. Repr. 825; *Moseley v. Shattuck*, 43 Iowa, 540.

³ Code (1888), §3835; *Dawson v. Meade*, 71 Iowa, 295; s. c. 37 N. W. Repr. 274.

⁴ Code (1888), §3314; *Neilson v. Iowa East. Ry. Co.*, 44 Iowa, 71.

KANSAS.

§347. Effect of Record.

Every instrument of writing that conveys any real estate, or whereby any real estate may be affected, may be recorded; and no such instrument shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record.¹ The instrument is notice from the time it is deposited and filed for record. Powers of attorney, and revocations thereof, are to be recorded as deeds, and the power must be recorded prior to or at the same time with a deed made by virtue of it.²

¹ Comp. Stats. 1885, §§1103-1105; Dassler's Comp. Stats. Kan. (1881), §§1042, 1044; *Stone v. French*, 37 Kan. 145; s. c. 1 Am. St. Rep. 237; 14 Pac. Repr. 530; *Setter v. Alney*, 15 Kan. 157; *Johnston v. Williams*, 37 Kan. 179; s. c. 1 Am. St. Rep. 243; 14 Pac. Repr. 537; *Ogden v. Walters*, 12 Kan. 282. Actual notice supplies the want of registry. *School Dist. v. Taylor*, 19 Kan. 287; *Beaubrien v. Henderson*, 38 Kan. 471; s. c. 15 Pac. Repr. 184.

² Comp. Stats., §§1106, 1107; Dassler's Comp. Stats., §§1041-1043. See generally, as to effect of record, *Utley v. Fee*, 33 Kan. 683; *School District v. Taylor*, 19 Kan. 112; *Johnson v. Clark*, 18 Kan. 157; *Jones v. Lapham*, 15 Kan. 140; *Swartz v. Stees*, 2 Kan. 436; *Dresser v. Wood*, 15 Kan. 344; *Holden v. Garrett*, 23 Kan. 98.

§348. Mortgages of Realty.

A deed absolute in form, but intended to be defeasible, is not affected as against any person other than the grantee, or his heirs, or devisees, or persons having actual notice, unless the instrument of defeasance is recorded after due acknowledgment. A recorded mortgage may be discharged by an entry on the margin of the record by the mortgagee, and also by a release duly acknowledged and recorded, with reference to it in the record of the mortgage; and if by an attorney in fact, the power of attorney must be of record. Failure of the mortgagee, on demand, to have satisfaction entered of record, renders him liable in damages in the sum of one hundred dollars.¹

¹ Comp. Stats. 1885, ch. 68, §§2-8; *Mitchell v. Aten*, 37 Kan. 33; s. c. 1 Am. St. Rep. 231; 14 Pac. Repr. 530. Filing is notice. *Lee v. Birmingham*, 40 Kan. 312; s. c. 1 Pac. Repr. 73. Satisfaction; *O'Neill v. Douthitt*, 20 Pac. Repr. 493; *Lewis v. Kirk*, 28 Kan. 497.

§349. **Acknowledgment** is now required by statute. It may be made within the state¹ before any judge, or clerk of a court having a seal, justice, notary public, county clerk, register of deeds, mayor, or clerk of an incorporated city.

Without the state and within the United States, before a court of record, or clerk, or officer, holding the seal thereof, commissioner of deeds for Kansas, or justice of the peace.

In foreign countries, before any of the officers last named, or a United States consul. If taken before a justice of the peace, there must be a certificate attached by the clerk of a court of record as to his official character.² Conveyances may be executed or acknowledged or proved in any other state, territory or country in conformity with the laws thereof, or with the laws of Kansas.³ No separate examination or certificate is necessary in the case of married women. The form of a joint certificate may be as follows:

STATE OF }
COUNTY OF }

Be it remembered that on this day of, A. D. 18 . . ., before me (name and title of officer), duly commissioned in and for the county and state aforesaid, came John Smith, and Sarah, his wife, who are personally known to me to be the same persons who executed the foregoing instrument of writing as grantors, and they duly acknowledged the execution of the same.

In witness whereof, I have hereunto set my hand and affixed my seal, the day and year last above written.

[SEAL.]

(Signature and title.)⁴

Where the acknowledgment is by an attorney in fact, the certificate should state that he is known to the officer as such, and that he executed the instrument as attorney in fact, for himself and for his principal. Any corporation may convey lands by deeds, sealed by the common seal of the corporation, and signed by the president, vice-president,

or presiding member or trustee of said corporation; and such deed, when acknowledged by such officer to be the act of the corporation, or proved in the same manner provided for other conveyances of lands, may be recorded in like manner and with the same effect as other deeds.⁵

¹ Under the earlier statutes acknowledgment was held not essential to the record. *Brown v. Simpson*, 4 Kan. 76; but it is now. *Heil v. Redden*, 38 Kan. 255; s. c. 16 Pac. Repr. 742.

² Comp. Stats. (1885), §§1094, 1095. A notary public must use his official seal. *Meskinem v. Day*, 35 Kan. 40; s. c. 10 Pac. Repr. 14; and must attach the date of the expiration of his commission under penalty of \$100. Comp. Stats. (1885), §§3571, 3572.

³ Comp. Stats. (1885), ch. 22, §25. *Stinson v. Greer*, 22 Pac. Repr. 586.

⁴ Comp. Stats. (1885), §1095. The certificate must show the title of the officer, and that the grantor is personally known to him. *Id.* The certificate of acknowledgment is not conclusive. §1113.

⁵ Laws 1887, ch. 98, §1. Corporation deeds heretofore executed by the vice-president and duly sealed are declared as effectual as if signed by the president. *Id.*

§350. Proof by Witnesses.

Witnesses are not required to a conveyance. If the grantor die before acknowledgment, or his attendance cannot be procured, or he refuses to make the acknowledgment, proof for record may be made by any competent testimony. The certificate of proof by a subscribing witness may be as follows:

STATE OF }
COUNTY OF }

Be it remembered that on this.....day of....., A. D. 18.., before me (name and title of officer), duly commissioned in and for the county and state aforesaid, personally appeared John Doe and John Smith, by whose oaths, duly administered by me, it is proved to my satisfaction that Richard Roe, the grantor named in and who executed the foregoing deed of conveyance, has died since executing the same (or that from some other cause his attendance could not be procured in order to make the acknowledgment,

or that having appeared he refuses to acknowledge the deeds, as the case may be), and the said instrument of conveyance was so executed by the said Richard Roe, whose name is thereunto subscribed by himself as a party, in the presence of the said John Doe and John Smith.

Witness my hand and official seal, this day and year first above written.

[SEAL.]

(Signature and title.)¹

Where all the subscribing witnesses are dead, or cannot be had to prove the instrument, proof of their handwriting may be made before any court or officer authorized to take acknowledgment.²

¹ Comp. Stats. (1885), §§1096, 1097.

² Comp. Stats. (1885), §1102.

§351. Chattel Mortgages, unless accompanied and followed by an actual and continued change of possession of the property, are absolutely void as against the creditors of the mortgagor, and subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith filed for record in the county where the property is at the time, or if the mortgagor is a resident of the state, then in the county of which he is at the time a resident. The instrument filed is kept in the office for inspection. Such record is not effectual for a longer period than one year, unless within thirty days prior to the expiration of the year the mortgagee files an affidavit of renewal, exhibiting his interest in the property, or the amount of his debt secured by the mortgage at that time. Such affidavit is effectual though not filed within the thirty days, except as against a purchase or incumbrance of the property in good faith made before its actual filing.¹

¹ Comp. Laws (1885), §§3499-3505. Actual notice of an unfiled chattel mortgage, though effectual against subsequent purchasers and mortgagees, is of no effect whatever as against creditors of the mortgagor. *Crane v. Hull*, 26 Kan. 622. Record of chattel mortgages, *Dayton v.*

People's Sav. Bank, 23 Kan. 421; *Golden v. Cockrill*, 1 Kan. 25; s. c. 81 Am. Dec. 510. Description: *Corbin v. Kincaid*, 33 Kan. 649; s. c. 7 Pac. Repr. 145; *Crisfield v. Neal*, 36 Kan. 278; s. c. 13 Pac. Repr. 272; *Shaffer v. Pickrell*, 22 Kan. 619; *Brown v. Holmes*, 13 Kan. 482; *Schmidt v. Bender*, 39 Kan. 437; s. c. 18 Pac. Repr. 491; *Clark v. Voorhis*, 36 Kan. 144; s. c. 12 Pac. Repr. 529. Filing "forthwith," *McVay v. English*, 30 Kan. 368; s. c. 1 Pac. Repr. 795.

When a chattel mortgage is fully paid it is the duty, under same penalty, of the mortgagee, to enter satisfaction of record thereof as near as may be as provided in real property mortgages. *Comp. Stats.* (1885), §3506.

KENTUCKY.

§352. Effect and Time of Record.

No deed conveying any title to or interest in land for a longer time than five years, nor any agreement in consideration of marriage, shall be good against a purchaser for a valuable consideration, not having had notice thereof, or any creditor, unless the same be acknowledged by the party who shall execute the same, or be proved and lodged for record in the proper office as prescribed by law; and the provisions of this section shall apply with like protection to the creditor of, or innocent purchaser from, the heir or devisees of the grantor.¹ The record is to be made in the county clerk's office of the county in which the property, or the greater part of it, is situated. Deeds made by residents of Kentucky are to be lodged for record within sixty days from their date. If made by persons residing out of Kentucky and in the United States, within four months; if out of the United States, within twelve months.² The record of a deed made by virtue of a power of attorney is ineffectual, unless the power is also recorded.³

¹ Gen. Stats. Ky. (1887), p. 313, §8; Gen. Stats. Ky. (1873), p. 256, §8; Gen. Stats. (1883), p. 256, §8; *Swigert v. Bank of Ky.*, 17 B. Mon. 268; *Brown v. Terrell*, 83 Ky. 418; *Nelson v. Boyce*, 7 J. J. Marsh. 401; *Halstead v. Bk. of Ky.*, 4 J. J. Marsh. 554; *Portwood v. Outton*, 3 B. Mon. 347; *Sparr v. Trimble*, 1 Marsh. 279.

Actual notice supplies the want of registry. *Honore v. Bakewell*, 6 B. Mon. 67; s. c. 43 Am. Dec. 147; *Forepaugh v. Appold*, 17 B. Mon. 625, 631; *Underwood v. Ogden*, 6 B. Mon. 606; *Liggett v. Hale*, 2 A. K. Marsh. 129; *Johnston v. Gwathmey*, 4 Litt. 317; s. c. 14 Am. Dec. 135; *Russell v. Potree*, 10 B. Mon. 184; *Muller v. Englein*, 12 Bush, 441; *Hardin v. Harrington*, 11 Bush. 367.

² Gen. Stats. (1887), p. 315, §14; Gen. Stats., p. 257, §§14, 22; *Hog v. Perry*, 1 Litt. 172; *Winlock v. Hardy*, 4 Litt. 472; *Applegate v. Gracy*, 9 Dan. 215. A conveyance filed after the statutory time is notice from the time of filing. *Bennett v. Titherington*, 6 Bush, 192. Bond for title not recordable. *Corn v. Sims*, 3 Met. 401.

³ Gen. Stats. (1887), p. 315, §13; Gen. Stats., p. 257, §13; *Graves v. Ward*, 2 Duval, 301; *Hancock v. Byrne*, 2 Dana, 40; *Herndon v. Bascom*, 8 Dana, 113. Effect of record, *Ashbrook v. Roberts*, 82 Ky. 298; *Hardin v. Harrington*, 11 Bush, 367; *Blight v. Banks*, 6 Mon. 192; s. c. 17 Am. Dec. 136; *Morton v. Robards*, 4 Dan. 260; *Johnston v. Gwathmey*, 4 Litt. 317; s. c. 14 Am. Dec. 135.

Possession is notice. *Singleton v. School Dist.*, 10 S. W. Repr. 793; *Hopkins v. Garrard*, 7 B. Mon. 312; *Fox v. Hinton*, 4 Bibb. 559.

§353. Mortgages, Real and Chattel.

Deeds of trust and mortgages of real or personal estate are not valid against a purchaser for value without notice thereof, or against creditors, until duly acknowledged or proved and lodged for record.¹ Mortgages may be released on the margin of the record. There may also be a common law release. All *bona fide* deeds of trust or mortgages shall take effect in the order that the same shall be legally acknowledged or proved and lodged for record.²

¹ Gen. Stats. (1887), p. 313, §10; Gen. Stats., p. 256, §10; *Lyons v. Fields*, 17 B. Mon. 543; *Morris v. Murray*, 82 Ky. 36; Gen. Stats., ch. 43, §24.

As to chattel mortgages, see *Vaughn v. Bell*, 9 B. Mon. 447; *Miller v. Henshon*, 4 Dan. 325; *Singleton v. Young*, 2 Dan. 559; *Loth v. Carty*, 85 Ky. 591; s. c. 4 S. W. Repr. 314.

As to creditors and purchasers under the recording acts, see *Morton v. Robards*, 4 Dana, 258; *Righter v. Forester*, 11 Bush, 478; *Edwards v. Drinker*, 9 Dana, 69; *Halstead v. Bank of Ky.*, 4 J. J. Marsh. 554.

² Gen. Stats. (1887), p. 314, §§11, 12; Gen. Stats., p. 256, §§11, 12.

§354. Acknowledgment.

Deeds of persons other than married women may be acknowledged or proved within the state before the clerk of a county court.

Without the state and within the United States, before the clerk of a court, his deputy, or a notary public, mayor of a city, secretary of state, commissioner of deeds, or a judge certifying under the seal of his court.

In foreign countries, before any foreign minister, consul or secretary of legation of the United States, or the secretary of foreign affairs, or the judge of a superior court of such foreign country.¹

Corporations execute instruments in the same manner as individuals, and the acknowledgment and certificate are in the same form, except that the corporation must sign and acknowledge by its principal officer, and with seal. -

¹ Gen. Stats. (1887), p. 516, §§15-17; Gen. Stats., ch. 24, §§15-17; *Gordon v. Leach*, 81 Ky. 229; *Ralston v. Moore*, 83 Ky. 571; *Jefferson v. Heil*, 81 Ky. 513; *Talbot v. Hoosier*, 12 B. Mon. 408; *Harpending v.*

Bush, 14 Bush, 380; Dickerson v. Talbot, 14 B. Mon. 60; Miller v. Henshaw, 4 Dana, 325; Alexander v. DeKemel, 81 Ky. 345; Breckenridge v. Todd, 3 Mon. 52; s. c. 16 Am. Dec. 83; Brown v. Swift, 1 S. W. Repr. 474; Harris v. Price, 14 B. Mon. 333; Simpson v. Lovering, 3 Bush, 458; s. c. 96 Am. Dec. 252; Hedges v. Ward, 15 B. Mon. 106.

A recorded deed, executed out of the state, the acknowledgment of which before a notary public is certified under his official seal, takes priority over a deed executed out of the state, which was recorded before the former deed, but the acknowledgment of which before a notary public is not certified under his seal, as required by Gen. St. Ky., ch. 24, §16, which provides that "deeds executed out of the state may be admitted to record, when the same shall be certified under his seal of office by a notary public," etc. Herd v. Cist (Ky.), 12 S. W. Repr. 466.

§355. Acknowledgment of Married Women.

A married woman has not power to act as a *feme sole* unless her husband abandons her, leaves the state without making provision for her support, or is confined in the penitentiary for a term of more than one year, or unless she is authorized by court. The deed of a married woman may be acknowledged before any of the officers above named, but when acknowledged within the state before a clerk of the county court, although privy examination, explanation of the deed, etc., must be made in such case, it need not be stated in such clerk's certificate of the acknowledgment. The form of joint certificate where the deed is made and acknowledged without the state, is as follows:

STATE OF..... }
COUNTY OF..... }

I, A. B. (here give title), do certify that this instrument of writing from C. D. and wife, E. F. (or from E. F., wife of C. D.), was this day produced to me by the parties and which was acknowledged by the said C. D. to be his act and deed; and the contents and effect of the instrument being explained to the said E. F. by me, separately and apart from her husband, she thereupon declared that she did freely and voluntarily execute and deliver the same to be her act and deed and consented that the same might be recorded.

Given under my hand and seal of office, this.....day
of....., 18..,

[SEAL.]

(Signature and title.)¹

¹ Gen. Stats. (1887), p. 318, §21; Gen. Stats., ch. 24, §§16, 21; Miller v. Shackelford, 3 Dan. 299; Dowell v. Mitchell, 82 Ky. 47; Prewett v. Graves, 5 J. J. Marsh. 119; Gregory v. Ford, 5 B. Mon. 471; Steele v. Lewis, 1 Mon. 49; McCormack v. Woods, 14 Bush, 78; Nanty v. Bailey, 3 Dana, 111; Blackburn v. Pennington, 8 B. Mon. 219; Hughes v. Coleman, 10 Bush, 248; Kay v. Jones, 5 J. J. Marsh. 135; Gill v. Fountleroy, 8 B. Mon. 177; Martin v. Davidson, 3 Bush, 574; Phillips v. Green, 3 A. K. Marsh. 7; s. c. 13 Am. Dec. 124; Moorman v. Board, 11 B. Mon. 185; Cox v. Gill, 83 Ky. 669; Dowell v. Mitchell, 82 Ky. 47; Gordon v. Leach, 81 Ky. 229.

By statute a non-resident married woman may convey lands in Kentucky by power of attorney; but if she is a resident, the statute does not apply. Bank of Louisville v. Gray, 84 Ky. 565; s. c. 2 S. W. Repr. 168; Gen. Stats., ch. 24, §36.

§356. Proof by Witnesses.

Proof for record may be made by two subscribing witnesses, or by one who shall also prove the attestation of the other, or by proof of two witnesses that the subscribing witnesses are both dead, or out of this state, or one so absent and the other dead, and like proof of the signature of one witness and of the grantor. The form of certificate is as follows, or on the certificate of clerk of county court that the same has been acknowledged or proved before him.

STATE OF..... }
COUNTY OF..... }

I, A. B. (here give his title), do certify that this day came before me G. H. and I. J., the subscribing witnesses to the foregoing deed (or other instrument) by C. D. to L. M., which witnesses are personally known to me to be the same whose names are so written as witnesses, and being solemnly sworn by me in due manner, did severally declare on their oaths that the said C. D. did acknowledge this instrument to be his act and deed, that the signature thereto was made by him, that they know him to be the same per-

son who is named as the grantor therein, and that they did subscribe said deed as witnesses by his request.

Given under my hand and seal of office, this.....day of....., 18...

[SEAL.]

(Signature and title.)¹

¹ Gen. Stats. (1887), p. 316, §15; Gen. Stats., ch. 24, §15; Pyle v. Maulding, 7 J. J. Marsh. 204. As to recorded deed in evidence, see Hood v. Mathers, 2 Marsh. 558. Officers' fees, Bussing v. Crain, 8 B. Mon. 593.

A mechanic's lien must be filed within sixty days. Gen. Stats., ch. 70; Fouche v. Grigsby, 12 Bush, 75; Gere v. Cushing, 6 Bush, 304.

LOUISIANA.

§357. Effect of Record.

No notarial act concerning immovable property shall have any effect against third persons, until the same shall have been deposited in the proper recording office of the parish where such immovable property is situated. All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording. The recording shall have effect from the time when the act is deposited in the proper office and indorsed by the proper officer.¹

¹ Rev. Civ. Code La. (1870), §§2264, 2266; *Hollingsworth v. Wilson*, 32 La. Ann. 1012; *Berwin v. Weiss*, 28 La. Ann. 263; *McIlvaine v. Legare*, 34 La. Ann. 923; *Roberts v. Bauer*, 35 La. Ann. 453; *Ripoll v. Morena*, 12 Rob. 560; *Tessier v. Hall*, 7 Mart. 411; *Taylor v. Lauer*, 26 La. Ann. 307; *Gaines v. New Orleans*, 6 Wall. 642. Actual notice of an unrecorded conveyance is ineffectual for any purpose. *Harang v. Plattsmier*, 21 La. Ann. 436; *Derbes v. Romero*, 32 *Id.* 927; *Payne v. Pavay*, 29 *Id.* 116; *Adams v. Daunis*, 29 *Id.* 315; *Dyke v. Dyer*, 14 *Id.* 701. Possession not notice. *Poydras v. Laurans*, 6 *Id.* 770; see *New Orleans v. Labrousche*, 31 *Id.* 839.

The office of parish recorder no longer exists. Out of the parish of Orleans the officer is known as the clerk of the district court; in the parish of Orleans the officers are known as recorder of mortgages, and register of conveyances.

§358. Mortgages of Realty.

All mortgages, whether conventional, legal or judicial, are required to be recorded in the book of mortgages in the parish where the property lies, and until thus publicly inscribed, they do not bind the property of the debtor, nor affect third parties.¹ If the instrument be an authentic act, a copy thereof shall be recorded; if an act under private signature, it must be proved up and recorded in the manner required for acts under private signature.² Neither the contracting parties, nor their heirs, nor those who were witnesses to the act by which the mortgage was stipulated, can take advantage of the non-inscription of the mortgage,

where it has been inscribed at any time within ten years' reckoning from the day of its date.³ The record ceases of effect after the expiration of ten years, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made.⁴ The ten years are reckoned as between the parties from the date of the mortgage, and as to third parties from the date of its record.⁵ A cancellation of the mortgage, or erasure of record, is made on presentation to the recorder of the acts, receipts and judgments, which operate as a release of the mortgage, with the certificate of the notary public before whom the act was executed, stating by such act a release was granted and the erasure allowed. This certificate is filed in the office of the recorder of mortgages where such cancelling is asked, or if the erasure has been given by an act under private signature, it should be duly acknowledged or proved for record.⁶

¹ Civ. Code, §§3342-3370; *Testart v. Belo*, 31 La. Ann. 295; *Chaffee v. Walker*, 39 La. Ann. 35; s. c. 1 South. Repr. 290. Where the act is deposited in the proper office and indorsed by the proper officer, its transcription into a wrong book will not prejudice the rights of the grantee therein. *Lewis v. Klotz*, 39 La. Ann. 259; s. c. 1 South. Repr. 539. See, however, *Colomer v. Morgan*, 13 La. Ann. 202; *McCann v. Bradley*, 38 *Id.* 482.

² A record of all the material parts of a mortgage is sufficient, although it be not a copy of the entire instrument. *Estate of Prudhomme*, 35 La. Ann. 984.

³ Civ. Code, §3369; *Adams v. Daunis*, 29 La. Ann. 315; *Sorrells v. Stamper*, 27 *Id.* 630. Unless the mortgage is inscribed within ten years from its date, it ceases of effect even between the parties. *Tilden v. Morrison*, 33 La. Ann. 1067. A purchase money mortgage, unless it be seasonably recorded, will not have preference over a judgment already of record against the mortgagor. Such a mortgage made in October, 1875, is not seasonably recorded in September, 1876. *Givanovitch v. Hebrew Congregation*, 36 La. Ann. 272, 274. See *Citizens' Bk. v. Terry*, 32 *Id.* 310.

Where an act of sale reserving the special mortgage and vendor's privilege was passed and completed on Saturday, at the hour of the legal closing of the office of the recorder of mortgages, and said act was filed by said recorder for inscription, and the inscription was made on the Monday morning following without delay; *held* that this inscription preserved the vendor's privilege as against prior recorded mortgages, as it was seasonably made. *Way v. Levy* (La.), 6 South. Rep. 661.

⁴ *Tilden v. Morrison*, *supra*. See further as to re-inscription, *ante*, §173; *Succession of Gale*, 30 La. Ann. 351.

⁵ *Batey v. Woolfolk*, 20 La. Ann. 385; *Walker v. Cucullu*, 15 *Id.* 689; *ante*, §175; *Horton v. Cutler*, 28 La. Ann. 331.

⁶ Civ. Code, §§3371-3385. An unauthorized cancellation by the recorder cannot impair the rights of the holder of the mortgage. *Mechanic's Building Ass'n v. Ferguson*, 29 La. Ann. 548; *Guesnard v. Soulie*, 8 La. Ann. 58; *De St. Romes v. Blanc*, 20 La. Ann. 424; *Horton v. Cutler*, 28 La. Ann. 331. The record of a deed will not operate as notice of a mortgage or of any mortgage rights thereunder. *McCann v. Bradley*, 38 La. Ann. 482; *Cordeviolle v. Dawson*, 26 *Id.* 534; *Fisher v. Tunnard*, 25 *Id.* 179. Nor will the record of a deed of trust have such effect. *Thibodeaux v. Anderson*, 34 *Id.* 797. See *Hutchins v. Fields*, 10 La. Ann. 237; *Watson v. James*, 15 La. Ann. 386.

§359. Acknowledgment.

An authentic or notarial act is made or passed with assisting witnesses before an officer, and it includes together execution, acknowledgment and delivery.¹ Acts under private signature are acknowledged or proved for record.² Such acknowledgment or proof may be made within the state before a notary public, parish recorder, or his deputy.

Without the state, before a commissioner for Louisiana, or acknowledgment may be made in conformity with the laws of the state where the act is passed. In such latter case the official character of the person before whom the acknowledgment is made must be properly verified, as by the certificate of a Louisiana commissioner. When not executed or acknowledged before a commissioner of Louisiana, they may be authenticated, if public records, in the manner prescribed by Revised Statutes of the United States, §906; otherwise, in the manner prescribed for affidavits. If the grantor be unknown, the officer taking the acknowledgment should in some way be satisfied of his identity. No particular form of words is necessary for the certificate.

Where a married woman joins with her husband in any act affecting his real estate, a privy examination and explanation of the act is requisite. The form of joint certificate of acknowledgment of an act under private signature is as follows:

STATE OF }
COUNTY OF }

Be it remembered that on this day came before me (here insert the name and title of officer), within and for the state and county aforesaid, duly commissioned and acting as such, John Smith, and Mary Smith, his wife, to me known personally, and signed the foregoing instrument in my presence and that of the two witnesses, whose names are thereunto subscribed as such, and the said Smith acknowledged that he had executed the foregoing instrument for the consideration and purpose therein mentioned and set forth; and I examined the said Mary Smith separate and apart from, and out of the presence of her husband, touching her freedom of action in the premises, fully explained to her the nature of said act and the effect it would have upon her rights, and I informed her, before receiving her signature thereto, that she had upon the property of her husband, by the laws of Louisiana, a legal mortgage on the immovables, and a privilege upon the movables of her husband, to-wit: *First.* For the restitution of her dowry, as well as for the replacing of her dotal effects which she brought at the time of her marriage, and which were alienated by her husband, and this from the time of the celebration of the marriage. *Second.* For the restitution or the replacing of the paraphernal effects which she acquired during her marriage, either by succession or donation, from the day when the succession devolved to her or such donation began to have its effect; and that by signing said act she would forever lose her rights upon the property therein (mortgaged or sold), but the said Mary Smith persisted in declaring that her action herein was free and voluntary, that she fully understood the nature of her rights, and the effect of her renunciation, but that she nevertheless persisted in her intention to renounce said rights upon said property.

Witness my hand and seal of office, this.....day
of....., A. D. 18..

Witnesses:

A. B.

C. D.

(Signature and title).

¹ An authentic act of sale, whether passed before an officer within the state, or before a Louisiana commissioner without the state, requires the presence of two competent witnesses. *Leibe v. Hebersmith*, 39 La. Ann. 1050; s. c. 3 South. Repr. 283.

² The record will impart constructive notice without acknowledgment, which is necessary only where the recorded instrument, or a copy thereof, is offered in evidence without proof of execution. Civ. Code, §2270; *Stallcup v. Pyron*, 33 La. Ann. 1249; *Allen v. Whetstone*, 35 *Id.* 850; *Fairthorn v. Davis*, 28 *Id.* 725.

§360. Chattel Mortgages and Privileges.

Chattel mortgages, except of a ship or vessel, are unknown to the laws of Louisiana.¹ All movables, whether corporeal or incorporeal, may be pledged or pawned, and, as against third persons, the pawn or pledge must be an act before a notary, or under private signature. All pledges of movable property must be accompanied by actual delivery, either to the pledgee or some third party agreed upon. Privileges or liens are usually not good against third persons without record.² When created by virtue of a contract, they are required to be recorded within seven days from the time the contract was entered into, if the property to be affected is situated in the parish where the contract is made; if in another parish, the recordation may be made within fifteen days. As against third persons without lien, the privilege is good from the time of its record.³

¹ *Delop v. Windsor*, 26 La. Ann. 185.

² As an artificer's privilege. *Van Loan v. Heffner*, 30 La. Ann. 1213.

³ *Succession of Clay*, 34 La. Ann. 1131. The registry of a promissory note reciting that "the above amount is the balance of the payment due on three boilers furnished," sufficiently gives notice of a vendor's privilege retained. *McIllvane v. Legare*, 34 La. Ann. 923. A mortgage of real estate includes crops grown thereon. *Williamson v. Richardson*, 31 La. Ann. 685; and also work animals, implements and machinery used thereon. *Weil v. Lapeyre*, 38 La. Ann. 303.

MAINE.

§361. Effect of Record.

Conveyances of real property and leases for more than seven years are not effectual against any person except the grantor, his heirs and devisees, and persons having actual notice, unless recorded in the registry of deeds for the county or district where the lands lie.¹ A deed absolute in form cannot be defeated by a defeasance, as against any other person than the maker, his heirs, or devisees, unless such defeasance is recorded in the same office as the deed.² Mortgages may be discharged by deed of release, or by an entry of satisfaction in the margin of the record.³

¹ Rev. Stats. (1883), ch. 73, §8; Rev. Stats. (1871), §8; *Roberts v. Bourne*, 23 Me. 165; s. c. 39 Am. Dec. 614; *Jones v. McNarrin*, 68 Me. 334; s. c. 28 Am. Rep. 63; *Stedman v. Perkins*, 42 Me. 130; *Hill v. McNicol*, 76 Me. 314; *Head v. Goodwin*, 37 Me. 181; *Sawyer v. Pennell*, 19 Me. 167; *Bailey v. Myrick*, 50 Me. 171; *Humphreys v. Newman*, 51 Me. 140; *White v. Putnam*, 76 Me. 571; *Libbey v. Staples*, 39 Me. 166.

Actual notice supplies want of registry. *Rich v. Roberts*, 48 Me. 548; *Butler v. Stevens*, 26 Me. 484; *Mathews v. Riggs*, 80 Me. 107; s. c. 13 Atl. Repr. 48; *Hull v. Noble*, 40 Me. 459, 480; *Knapp v. Bailey*, 79 Me. 195; s. c. 9 Atl. Repr. 122. A recorded deed takes precedence of attachments and seizures on executions not previously recorded.

² Rev. Stats., ch. 73, §9. An instrument transcribed into a wrong book of record does not impart notice. *Shaw v. Wilshire*, 65 Me. 485. The record cannot be varied by parol. *Hatch v. Haskins*, 17 Me. 391.

Possession as notice. *Worcester v. Lord*, 56 Me. 265; s. c. 96 Am. Dec. 456; *Clark v. Bosworth*, 51 Me. 528; *Webster v. Maddox*, 6 Me. 236; *Wyman v. Brown*, 50 Me. 160; *Beal v. Gordon*, 55 Me. 482; *Knapp v. Bailey*, *supra*.

³ Rev. Stats., ch. 90, §§25, 26; *Conner v. Whitmore*, 52 Me. 185; *Cobb v. Dyer*, 69 Me. 494.

§362. Acknowledgment may be made within the state by any one grantor before a justice of the peace, or notary public.

Without the state, before a justice of the peace, notary public, magistrate, or commissioner of deeds for Maine.

In foreign countries, before a notary public, consul, or minister of the United States.¹ Officers having seals of office are required to use them. No separate acknowledg-

ment or certificate is required as to the wife.² The form of acknowledgment may be as follows:

STATE OF..... }
COUNTY OF..... }

On this.....day of....., A. D. 18.., personally appeared before me (name and title of officer), the above named John Smith, and Mary Smith, his wife, and acknowledged the foregoing instrument to be their free act and deed.

Witness my hand and official seal the day and year aforesaid.

[SEAL.]

(Signature and title).

If acknowledged by an agent of a corporation, it should be: "the free act and deed of the said (corporation by name)."

¹ Rev. Stats., ch. 73, §17; *Brown v. Lunt*, 37 Me. 423.

² *Allen v. Hooper*, 50 Me. 371.

§363. Proof by Witnesses.

Subscribing witnesses are not required, but one witness is usual; and where the grantor refuses to acknowledge, proof for record may be made by such witness before a justice of the peace, on notice to the grantor, a copy of the deed in the registry operating in the meantime as a record for forty days. When the grantor dies, or departs from the state, without acknowledgment, the proof may be made before a court of record within the state, by the subscribing witness, or, in case of his death, by other testimony. The certificate of proof, before a justice of the peace within the state, may be as follows:

STATE OF MAINE, }
COUNTY OF..... }

On the.....day of....., 18.., at the request of John Doe, the grantee in the foregoing deed, I caused Richard Roe, the grantor, a resident of this county, to be legally summoned to appear before me, on the.....day

of....., 18.., to hear the testimony, John Smith and William Jones, subscribing witnesses to said deed, therein stating the date of said deed, the names of the parties thereto, and of the subscribing witnesses; and on said day of....., 18.., said witnesses appeared and testified, and said grantor was (or was not) present, and I was satisfied by the testimony of said witnesses that they saw said deed duly executed by Richard Roe, the grantor.
(Signature and title).

§364. Chattel Mortgages are not valid against any other person than the parties thereto, unless possession of the property be taken and retained by the mortgagee, or the mortgage be recorded by the clerk of the city, town or plantation, in which the mortgagor resides, or, in case of a non-resident mortgagor, where the property is when the mortgage is made; but if part of the mortgagors reside in the state, then in the cities, towns or plantations in which such mortgagors reside. A mortgage made by a corporation shall be recorded in the town where it has its established place of business.¹ Registry of conditional sales is required where the amount remaining unpaid is as much as thirty dollars.²

¹ Rev. Stats. (1883), ch. 91, §1; Acts 1880, ch. 193; *Griffith v. Douglass*, 73 Me. 532; s. c. 40 Am. Rep. 359; *Fairfield v. Nye*, 60 Me. 372; *Shaw v. Wilshire*, 65 Me. 485; *Morrill v. Sanford*, 49 Me. 566. Actual notice of an unfiled chattel mortgage is unavailing. *Sheldon v. Conner*, 48 Me. 584; *Rich v. Roberts*, 48 Me. 548.

² Rev. Stats., ch. 111, §5; *Nicols v. Ruggles*, 76 Me. 25; *Field v. Gellerson*, 80 Me. 270; s. c. 14 Atl. Repr. 70; *Boynnton v. Libby*, 62 Me. 253; *Rogers v. Whitehouse*, 71 Me. 222; *Stone v. Perry*, 60 Me. 48; *Drew v. Smith*, 59 Me. 393; *Rawson v. Teel*, 47 Me. 506. The stipulation by which the sale is made conditional must be embodied in the note, locally known as a "Holmes note," that is given for the unpaid price. *Field v. Gellerson*, and cases *supra*.

A levy of execution on real estate by appraisal and deeds (where levy is by sale) must be recorded within three months after levy, to be good against intervening title. Rev. Stats., ch. 76, §16.

MARYLAND.

§365. Effect and Time of Record.

No deed of real property nor of any estate above seven years, nor any declaration or limitation of use, shall be valid for the purpose of passing title, unless acknowledged and recorded as by the statute directed.¹ Deeds are to be recorded in the counties in which the land lies, within six months, and, thereupon, take effect as between the parties from their date. In the case of two or more deeds or mortgages of the same land, the one first recorded is preferred, if made *bona fide*, and for good and valuable consideration. A deed may be recorded after six months, and such record is effectual as against the grantor, his heirs, or executors, and against all purchasers with notice, and against creditors, who shall become so after the recording of the deed. So, where possession is taken, the record of the deed after the six months is effectual against all persons from the time of taking possession, except that as against all creditors, who have become so before the recording of the deed, and without notice of its existence, it has effect only as a contract to convey.² A power of attorney is to be recorded with a deed made by virtue of it. Bonds for title and revocations of powers are to be recorded. An agent or attorney in fact must describe himself in and sign the deed as such.³

¹ Rev. Code Md. (1878), title 24, §16; *Tyler v. Aberg*, 65 Md. 18; *Rosenthal v. Ruffin*, 60 Md. 324; *Leinman's Estate*, 32 Md. 325; *U. S. Ins. Co. v. Schriver*, 3 Md. Ch. 381; *Hawkins v. Burrell*, 1 Har. & J. 513; *Word v. Hollins*, 14 Md. 158; *Ellinger v. Crowl*, 17 Md. 361; *Repp v. Repp*, 12 Gill & J. 341; *Carson v. Phelps*, 40 Md. 73; *Clabaugh v. Byerly*, 7 Gill, 364; *Bryden v. Campbell*, 40 Md. 331.

Actual notice of an unrecorded deed is effectual. *Price v. McDonald*, 1 Md. 403; s. c. 54 Am. Dec. 657; *Frostburg v. Hamill*, 55 Md. 313; *Alderson v. Ames*, 6 Md. 52; *Carr v. Hobbs*, 11 Md. Eq. 161; *The Gen. Life Ins. Co. v. The U. S. Life Ins. Co.*, 10 Md. 517; s. c. 49 Am. Dec. 174; *Hudson v. Warner*, 2 Har. & G. 415.

Possession is notice. *Thompson v. Banks*, 2 Md. Ch. 430; *Gittings v. Hall*, 2 H. & Johns. 112; s. c. 2 Am. Dec. 502; *Baynard v. Norris*, 5 Gill, 483; s. c. 46 Am. Dec. 47.

² Rev. Code, pp. 385, 386, §§19-24. Where the land lies in more than one county, or in the city of Baltimore and a county, or counties, the deed must be recorded in each of them.

² Rev. Code, p. 387, §§26-30. Judgments, records and deeds in another state, or foreign country, may be made evidence in Maryland by an exemplification of the record under the hand of the keeper of the same, and seal of the court or office where such document may be of record, or a transcript authenticated as required by the Rev. Stats. of U. S., will be sufficient. Rev. Code, Md., art. 70.

§366. Mortgages of Realty.

Mortgages are to be executed, acknowledged and recorded the same as deeds.¹ An affidavit as to the truth and *bona fides* of the consideration is required, and without this, the record of the mortgage does not impart constructive notice.² Assignments of mortgages may be recorded with the effect of notice. This does not, however, affect equitable assignments, made by virtue of a transfer of the mortgage debt.³ Where a deed, absolute in its terms, is intended and shown by any other instrument or writing to be a security or mortgage, the person for whose benefit the deed is made can have no advantage from recording it, unless the instrument of defeasance or condition be also recorded with it.⁴ Mortgages may be released by an entry made on the margin of the record by the mortgagee, or his executor, administrator, or assignee; or by a release on the back of the original which is delivered to the clerk, and such release noted by him at the foot of the record.⁵

¹ Rev. Code, title 24, §34; *Brooks v. Lester*, 36 Md. 65; *Ahern v. White*, 39 Md. 409. A mortgagee not *bona fide* gains nothing by priority of record. *Willard v. Ramsburg*, 22 Md. 206.

Actual notice of a prior mortgage, to a judgment creditor, before entry of judgment, is effectual. *Pfeaff v. Jones*, 50 Md. 263.

² Tit. 24, §§35, 36; *Reiff v. Eshleman*, 52 Md. 582; *Milholland v. Tiffany*, 64 Md. 455; s. c. 2 Cent. Repr. 632.

³ *Byles v. Tome*, 39 Md. 461. For effect, as to prior creditors, of the record of a mortgage after six months from its date, under decree of a court of equity, see *Stanhope v. Dodge*, 52 Md. 483.

⁴ Rev. Code, art. 66, §42; *Owens v. Miller*, 29 Md. 144. A deed fraudulent and void as against antecedent creditors is valid, if recorded, as against subsequent creditors. *Kane v. Roberts*, 40 Md. 590; *Williams v. Burbanks*, 11 Md. 250.

⁵ Rev. Code, pp. 389, 390, §§37, 44. In the latter case, the clerk retains the original mortgage in the office, and does not permit it to be again withdrawn.

§367. Acknowledgment may be made within the state before a justice of the peace,¹ judge of the Orphans' Court, or of the Circuit Court of any county, or judge of the Superior Court, Court of Common Pleas, or Circuit of Baltimore city.

Without the state and within the United States, before a notary public, judge of any court of the United States, judge of any court of any state or territory having a seal, or a commissioner of deeds for Maryland.

In foreign countries, before any minister, consul-general, consul, deputy consul, vice-consul, consular agent, or consular officer of the United States, any notary public, or commissioner of deeds for Maryland.

No separate examination of a married woman is now required.² A certificate of acknowledgment taken out of the state before a court, should have the seal of such court affixed. The statute prescribes forms of certificate of acknowledgment, but provides that any form containing the substance of those prescribed shall be sufficient.³ The certificate of joint acknowledgment is as follows:

STATE OF }
COUNTY OF }

I hereby certify that on this.....day of....., 18..., before me (here insert name and title of official), appeared, and....., his wife, and did each severally acknowledge the foregoing deed (or other instrument) to be their act.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal the day and year above written.

[SEAL.]

(Signature and title.)⁴

Proof can be made of the identity of the grantor, if disputed, by evidence taken under commission, and in some cases by affidavits of parties; but the certificate of the officer is sufficient without his certifying to having personal

knowledge of the grantor. A deed by a corporation should contain a power authorizing some one named therein to acknowledge it before the proper officer as the act of the corporation.

¹ Where the land lies outside of the county of a justice of the peace, his official character must be certified to by the clerk of the circuit or superior court under seal. §§8, 9; *Grove v. Todd*, 41 Md. 633; s. c. 20 Am. Rep. 76; *Gittings v. Hall*, 1 Har. & J. 14; s. c. 2 Am. Dec. 502; *Johns v. Reardon*, 3 Md. Ch. 57; *Sitler v. McComas*, 66 Md. 135; s. c. 6 Atl. Repr. 527.

² *Morris v. Harris*, 9 Gill, 19; formerly required, *Cent. Bank v. Cope-land*, 18 Md. 305; s. c. 81 Am. Dec. 597; *Hollingsworth v. McDonald*, 2 Har. & J. 230; s. c. 3 Am. Dec. 540.

³ Rev. Code, p. 396, §§78-81.

⁴ Rev. Code, p. 384, §§8-14; 29 Md. 211. The certificate must show the official character of the officer. §3; *Dyson v. Simmons*, 48 Md. 207; *Sitler v. McComas*, 66 Md. 135; s. c. 6 Atl. Repr. 527. Under former statutes this was not requisite. *Van Ness v. U. S. Bank*, 13 Pet. 17.

§368. Proof by Witnesses.

The statute requires one witness to a deed; but where the deed is acknowledged such witness is not necessary.¹ Proof for record may be made by subscribing witnesses in certain cases.²

Rev. Code, p. 383, §3; *Brydon v. Campbell*, 40 Md. 331; *Carrico v. Farmer's Bank*, 33 Md. 235; *Frostburg v. Brace*, 51 Md. 508.

² Rev. Code, art. 70, §37; *Laws 1882*, ch. 77. Deeds are required to have a seal, but waxen or wafer seals are not required; a scroll made by a pen or printed is sufficient.

§369. Chattel Mortgages not accompanied by delivery of the property are invalid, unless the mortgage, duly acknowledged, be recorded in the county or city where the seller resides, within twenty days from the date thereof. They are good as between the parties thereto without record, but take effect as to third persons only from the time of recording; and in case of more than one mortgage, the one first recorded has preference. An affidavit that the consideration in the mortgage is true and *bona fide* as therein

set forth, is necessary and must be recorded with the mortgage.¹

¹ Rev. Code, p. 391, §§45-54; *Stanhope v. Dodge*, 52 Md. 483; *Ing v. Brown*, 3 Md. Ch. 521; *Nelson v. Hagerstown Bank*, 27 Md. 51. The necessity for the affidavit is restricted to purely technical mortgages. A deed absolute on its face by mistake, if intended to be a mortgage, will be declared a valid mortgage by a court of equity, though it be without the affidavit. *Charles v. Claggett*, 3 Md. 82.

A *bona fide* purchaser from a conditional vendee of personal property in possession of it, will be protected. *Lincoln v. Quinn*, 68 Md. 299; s. c. 6 Am. St. Rep. 446; 11 Atl. Repr. 848; *Hall v. Hinks*, 21 Md. 406.

Leases. All rents reserved by lease, or sub-lease, for a longer period than 15 years, returnable at any time after the expiration of ten years, at option of tenant, after a notice of six months to landlord, for a sum of money equal to the capitalization of rent, at a rate not to exceed six per centum. Act 1884, ch. 485; Act 1888, ch. 395.

Whenever lessee, under lease with covenant for perpetual renewal, or any person claiming under such lessee, has retained uninterrupted possession for 12 months after expiration of lease or sub-lease, execution of new lease or sub-lease conclusively presumed. Act 1886, ch. 154.

The words in a deed "die without issue" shall be construed to mean failure of issue at time of death. Act 1886, ch. 236.

MASSACHUSETTS.

§370. Effect of Record.

Deeds are not valid as against persons other than the grantor, his heirs and devisees, and persons having actual notice, unless they are recorded in the registry of deeds for the county in which the land is situated. A power of attorney to convey real estate must be acknowledged and recorded with the deed.¹ Deeds are required to be sealed, and a scroll will not answer for a seal.

¹ Pub. Stats. Mass. (1882), ch. 120, p. 732; *Hill v. Ahern*, 135 Mass. 148; *Ahrend v. Odiorne*, 118 Mass. 261; *White v. Foster*, 102 Mass. 275; *Tracy v. Jenks*, 15 Pick. 465; *Norman v. Towne*, 130 Mass. 52; *The State v. Bradish*, 14 Mass. 291; *Trull v. Bigelow*, 16 Pick. 418; *Jordan v. Farnsworth*, 15 Gray, 517; *Morse v. Curtis*, 140 Mass. 112; s. c. 54 Am. Rep. 456; 2 N. E. Repr. 929; *Gillespie v. Rogers*, 146 Mass. 610; s. c. 16 N. E. Repr. 711.

Actual notice, in order to supply the want of registry, must be equivalent to knowledge. *Lamb v. Pierce*, 113 Mass. 72; *Connihan v. Thompson*, 111 *Id.* 270; *Suit v. Woodhall*, 113 Mass. 391; *Natl. Security Bk. v. Cushman*, 121 Mass. 490; *McMechan v. Griffing*, 3 Pick. 149; s. c. 15 Am. Dec. 198.

A recorded deed may be given in evidence without proof of its execution. *Samuels v. Borrowscale*, 104 Mass. 207. As to how far possession is notice, *Mara v. Pierce*, 9 Gray, 306; *Pomeroy v. Stevens*, 11 Metc. 244; *Lamb v. Pierce*, *supra*. As to creditors and purchasers, *Priest v. Rice*, 1 Pick. 164; *Clark v. Flint*, 22 Pick. 231; s. c. 33 Am. Dec. 733; *Glidden v. Hunt*, 24 Pick. 221; *Jewett v. Tucker*, 139 Mass. 566.

As to effect of record, *George v. Kent*, 7 Allen, 16; *Lamb v. Pierce*, 113 Mass. 72; *Earle v. Fisk*, 103 Mass. 491; *Flynt v. Arnold*, 2 Met. 619; *Briggs v. Rice*, 130 Mass. 50; *Marshall v. Fish*, 6 Mass. 24; s. c. 4 Am. Dec. 76.

§371. **Mortgages of Realty** are to be recorded as other conveyances of realty, and with like effect. When a deed absolute in terms is defeasible by any other written instrument, the record of the deed is not affected or defeated as against third persons without actual notice of the defeasance, unless the defeasance be also duly recorded.¹ Mortgages may be discharged by an entry on the margin on the record by the mortgagee, his executor, administrator or assignee; or by deed of release duly acknowledged and recorded.² If the holder of the mortgage, after its full satisfaction, neglects for seven days after request to enter sat-

isfaction, or duly execute a release, he is liable for all damages occasioned thereby.

¹ Pub. Stats., ch. 120, §23; *Dole v. Thurlow*, 12 Met. 157, 163; *Stetson v. Gulliver*, 2 Cush. 494, 497.

² Pub. Stats., ch. 120, §§24-26; *Blunt v. Norris*, 123 Mass. 55; *Childs v. Stoddard*, 130 Mass. 610; *Bruce v. Bonney*, 12 Gray, 107; *Clark v. Watson*, 141 Mass. 248; s. c. 5 N. E. Repr. 298.

The marginal entry in the registry of deeds may be as follows: "I, John Smith, hereby acknowledge to have received full payment and satisfaction of the debt secured by the within deed of mortgage here recorded, and do hereby cancel and discharge the same. Witness my hand."
(Signature).

§372. Acknowledgment may be made by the grantors, or one of them, within the state, before a justice of the peace or notary public.

Without the state and within the United States, before a justice of the peace, magistrate, or commissioner of deeds for Massachusetts.

In foreign countries, before a minister or any consular officer of the United States. When made before any officer other than a commissioner of deeds for Massachusetts, or a minister of the United States, there must be appended to the certificate a certificate of the officer's appointment and authority, made by the secretary of state, or clerk of a court of record.¹ No separate examination is necessary as to the wife;² nor is it necessary that the certificate state that she relinquishes her dower. The form of joint certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

On this.....day of....., A. D. 18.., before me (name and title of officer), personally appeared the above named....., and....., his wife, and severally acknowledged the foregoing instrument to be their free act and deed.

(Signature and title.)

¹ Pub. Stats., ch. 120, §§5, 6; ch. 18, §11; *Blood v. Blood*, 23 Pick. 80. Acknowledgment by one of several grantors is sufficient. *Palmer v. Palmer*, 75 Mass. (9 Gray), 56; *Shaw v. Poor*, 6 Pick. 86; s. c. 17 Am. Dec. 347; *ante*, §58.

² *White v. Graves*, 107 Mass. 325; s. c. 9 Am. Rep. 38.

§373. Proof by Witnesses.

A subscribing witness to a deed is not essential, but it is customary to have at least one witness. If the grantor dies, or departs from the state without acknowledging the deed, or refuses to acknowledge it, it may be proved by the subscribing witness. If subscribing witnesses are dead or out of the state, their handwriting, or that of the grantor, may be proved by competent evidence.¹

¹ Pub. Stats., ch. 120, §§5, 9.

§374. Chattel Mortgages not accompanied by delivery of the property are not valid as against third parties, unless recorded within fifteen days after their dates in the records of the city or town where the mortgagor resides or principally transacts his business, or if he is a non-resident, in the city or town where the property is. Where the record must be made in two places, it may be made in the second within ten days after record in the first. Chattel mortgages need not be acknowledged. Absolute bills of sale intended to operate as mortgages must be recorded as such.¹

¹ Pub. Stats., ch. 192; *Orcutt v. Moore*, 134 Mass. 48; *Shaughnessy v. Lewis*, 130 Mass. 355. Actual notice is of no effect. *Bingham v. Jordan*, 1 Allen, 373; s. c. 79 Am. Dec. 750; *Howard v. Chase*, 104 Mass. 251; *Eaton v. Tuson*, 145 Mass. 218; s. c. 13 N. E. Repr. 488.

As to chattel mortgages, see *Harding v. Coburn*, 12 Met. 333; *Henshaw v. Sumner*, 23 Pick. 446; *Haines v. Crane*, 2 Pick. 610; *Forbes v. Parker*, 16 Pick. 462; *Hunt v. Bay State Co.*, 97 Mass. 279; and filing within 15 days, *Drew v. Streeter*, 137 Mass. 460; *Orcutt v. Moore*, 134 Mass. 48; *Shaughnessy v. Lewis*, *supra*; *Jordan v. Farnsworth*, 15 Gray, 517.

As to personal property, *Moody v. Blake*, 117 Mass. 23; *Dane v. Baldwin*, 8 Mass. 521; and as to conditional sales thereof, *Coggell v. Hartford*, 3 Gray, 545; *Burbank v. Crocker*, 7 Gray, 158; *Zuchman v. Roberts*, 109 Mass. 53; s. c. 12 Am. Rep. 663; *Hirschorn v. Conway*, 98 Mass. 149; *Chase v. Ingall*, 122 Mass. 381; *Blanchard v. Cooke*, 144 Mass. 207; s. c. 11 N. E. Repr. 83; *Benner v. Puffer*, 114 Mass. 376; *Fairbanks v. Phelps*, 22 Pick. 535.

MICHIGAN.

§375. Effect of Record.

Every conveyance of real property which is not recorded as provided by statute is void as against subsequent purchasers in good faith for a valuable consideration, whose conveyances are first duly recorded.¹ A revocation of a recorded power of attorney must also be recorded.² A recorded deed is *prima facie* evidence without proof of execution.³ The register of deeds is required to keep an entry book, divided into six columns, in which conveyances are to be noted when filed for record.⁴

¹ Howell's Annotated Stats., 1882, §5683; Allen v. Cadwell, 55 Mich. 8; s. c. 20 N. W. Repr. 692; Barnard v. Campau, 29 Mich. 162; Columbia Bk. v. Jacobs, 10 Mich. 495; Loomis v. Bush, 36 Mich. 40; James v. Brown, 11 Mich. 25; Cooper v. Bigly, 13 Mich. 463; Smith v. Williams, 44 Mich. 420; Ginn v. Tobey, 62 Mich. 252; s. c. 4 Am. St. Rep. 848; 28 N. W. Repr. 818.

Actual notice supplies want of registry. Blanchard v. Tyler, 12 Mich. 339; s. c. 86 Am. Dec. 57; Oliver v. Sanborn, 60 Mich. 346; s. c. 27 N. W. Repr. 527; Stevens v. Hulin, 53 Mich. 93; s. c. 18 N. W. Repr. 569; Converse v. Blumrich, 14 Mich. 109; s. c. 90 Am. Dec. 290; The Great Western Ry. Co. v. Wheeler, 20 Mich. 419; Waldo v. Richmond, 40 Mich. 380; Int. Wrecking Co. v. McMoran, 41 N. W. Repr. 510; Mich. Cent. Ry. Co. v. Dolan, 32 Mich. 510; Hall v. Edwards, 43 Mich. 473; Shotwell v. Harrison, 30 Mich. 179.

² Howell's Stats., vol. 2, §5686. A conveyance invalid because of defective execution, acknowledgment or record, may in equity, and as far as its rules will permit, be enforced as a contract to convey. §5727; Edwards v. McKernan, 55 Mich. 520.

³ Howell's Stats., §5685; Pub. Acts 1889, p. 380. See further as to effect of record, Warner v. Whittaker, 6 Mich. 133; s. c. 52 Am. Dec. 65; Edwards v. McKernan, 55 Mich. 520; s. c. 22 N. W. Repr. 20; Stevens v. Castel, 63 Mich. 111.

Possession is notice. Allen v. Cadwell, *supra*; Bloomer v. Henderson, 8 Mich. 395, 405; s. c. 77 Am. Dec. 453; Doyle v. Stevens, 4 Mich. 87; even by grantor, after deed from him. Stevens v. Castel, *supra*; Bennett v. Robinson, 27 Mich. 26; Weisberger v. Wisner, 55 Mich. 246; s. c. 21 N. W. Repr. 331.

⁴ Howell's Stats., §5674; Pub. Acts 1889, p. 337. The grantee's name appeared in the entry book, but not in the transcribed record of the deed, and the record was held to impart notice. Sinclair v. Slawson, 44 Mich. 123; s. c. 38 Am. Rep. 235. *Lis pendens*: Hall v. Gustin, 54 Mich. 624; s. c. 20 N. W. Repr. 616.

See as to creditors and purchasers, Blanchard v. Tyler, 12 Mich. 339; s. c. 86 Am. Dec. 57; Palmer v. Williams, 24 Mich. 328; Kohl v. Lynn, 34 Mich. 360; Warner v. Whitaker, *supra*; Harrold v. Owen, 31 N. W. Repr. 420; Flint v. Auditor-Gen., 41 Mich. 635. Quit-claim purchaser. How. Stats., §5653; DeVeaux v. Fosbender, 57 Mich. 579.

§376. Mortgages of Realty are required to be recorded in separate books kept for that purpose. A deed absolute in terms, but intended to be made defeasible by force of a deed of defeasance or other instrument for that purpose, is not defeated or affected thereby, as against any person other than the maker, his heirs or devisees, or persons having actual notice, unless the defeasance is recorded. Mortgages may be discharged by an entry on the margin of the record signed by the mortgagee, his personal representative or assignee, or by the register whenever a certificate of payment, duly executed and acknowledged, is presented to him. Neglect for seven days after payment and request renders the person so neglecting liable in the sum of one hundred dollars damages, besides all actual damages and double cost.¹

¹ Howell's Stats., §§5701, 5704; *Ladue v. Detroit*, 13 Mich. 380; s. c. 87 Am. Dec. 759; *Bailey v. Gould*, Walk. 478; *French v. De Bow*, 38 Mich. 708; *Amphlet v. Hubbard*, 29 Mich. 298; *Kitchell v. Mudgett*, 37 Mich. 81; *Bassett v. Hathaway* (1862), 1 Am. Law. Reg. 185; *Cowles v. Marble*, 37 Mich. 158.

An attested copy of every will devising lands, or any interest in lands, and of the probate thereof, shall be recorded in the registry of deeds of the county in which the lands thereby devised are situated. Comp. Laws, p. 1378; How. Stats., §5822.

Foreign wills may be allowed, filed and recorded in the probate court of any county where testator has real or personal estate on which such will may operate. Pub. Acts (1883), p. 9.

As to duty of register of deeds, see Pub. Acts (1887), pp. 342-344.

§377. Acknowledgment may be made within the state before a judge or commissioner of a court of record, notary public or justice of the peace.

Without the state and within the United States, it may be made according to the law of the state where taken before any judge of a court of record, notary public, commissioner of deeds for Michigan, justice of the peace, master in chancery, or other officer authorized by the laws of such state to take acknowledgment.

In foreign countries, in accordance with the laws thereof, before any notary public therein, or minister plenipotentiary, minister extraordinary, minister resident, *chargé d'affaires*, commissioner or consul of the United States ap-

pointed to reside therein.¹ Where the acknowledgment is taken in another state, by an officer of such state, a certificate of magistracy and conformity by the clerk or other proper certifying officer of a court of record, is necessary.²

No separate examination necessary in acknowledgments of married women.³

The form of certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

Before me (name and title of officer), on this..... day of....., 18.., personally appeared....., and, his wife, and acknowledged the execution of the annexed deed (or mortgage).

(Signature and title).

¹ Howell's Stats., §§5658, 5659, 5661. An acknowledgment cannot be made by proxy. *Hoban v. Piquette*, 52 Mich. 346. See further as to the certificate of acknowledgment, *Buell v. Irwin*, 24 Mich. 152; *Wright v. Wilson*, 17 Mich. 192; *Final v. Backus*, 18 Mich. 218; *Marston v. Bradshaw*, 18 Mich. 81; s. c. 100 Am. Dec. 152.

² Howell's Stats., §§5660, 5726; *Harrington v. Fish*, 10 Mich. 415. The certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

I....., clerk of said county, and of the Circuit Court thereof, the same being a court of record, do hereby certify that C. K., Esq., before whom the annexed instrument appears to have been acknowledged, was at the date of taking the same a notary public (or as the case might be), within and for said county, duly commissioned, qualified and sworn, and authorized by the laws of this state to take and certify such acknowledgment; that I am acquainted with the handwriting of the said C. K., and believe that his signature appended to said certificate is genuine. And I further certify that said instrument is executed and acknowledged according to the laws of this state.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of....., this..... day of....., 18...

[SEAL.]

(Signature and title.)

³ How. Stats., §5662; Laws 1875, p. 142; *Watson v. Thurber*, 11 Mich. 457. For acknowledgment on behalf of a corporation see *Merrill v. Montgomery*, 25 Mich. 73. For forms of warranty and quit-claim deeds, mortgages and acknowledgments, see How. Stats., §§5728-5732; and for statute prohibiting the use of the word "warranty" in certain cases, Laws 1885, p. 243.

§378. Witnesses.

Deeds executed within the state must be executed in the presence of two witnesses, who must subscribe their names to the same as such. There is no statutory provision for the proof of deeds by subscribing witnesses out of the state.¹

¹ Record of the deed without the requisite witnesses is ineffectual. *Crane v. Reeder*, 21 Mich. 60.

§379. Chattel Mortgages not accompanied by an actual and continued change of possession of the property, are absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the originals, or a true copy thereof, be filed for record in the township or city where the mortgagor resides, or, in case of a non-resident of the state, where the property is. After one year from filing they cease to be valid against creditors of the mortgagor or subsequent purchasers and mortgagees, unless within thirty days next preceding the expiration of such year, an affidavit of renewal is filed, setting forth the interest which the mortgagee then has.¹ Such affidavit filed after the time is effectual, except as against purchases already made, or liens obtained in good faith prior to the re-filing.² Such renewals must be made annually to preserve the lien.³

¹ How. Stats., §6193; Comp. Laws, ch. 167; *Kohl v. Lynn*, 34 Mich. 360; *Hubbardston v. Covert*, 35 Mich. 254; *Briggs v. Leitelt*, 41 Mich. 79; *Cooper v. Brock*, *Id.* 488; *Reynolds v. Case*, 60 Mich. 76; s. c. 26 N. W. Repr. 838; *Flory v. Comstock*, 61 Mich. 522; s. c. 28 N. W. Repr. 701; *Root v. Harl*, 62 Mich. 420; s. c. 29 N. W. Repr. 29; *Manwaring v. Jemison*, 61 Mich. 117; s. c. 27 N. W. Repr. 899.

² Howell's Stats., §6196. "Creditors or subsequent purchasers or mortgagees," include those who become so at any time after the first filing, and not merely those who become such after the failure to re-file. *Wade v. Strachan*, 39 N. W. Repr. 382, and cases cited in note to How. Stats., §6196.

³ See further as to record of chattel mortgages, *Montgomery v. Wright*, 8 Mich. 143; *Warner v. Comstock*, 55 Mich. 615; s. c. 22 N. W. Repr. 64; *Fordyce v. Neal*, 40 Mich. 705; *Cass v. Gunnison*, 58 Mich.

108; *Wetherill v. Spencer*, 3 Mich. 123; *Crippen v. Fletcher*, 56 Mich. 386; *Briggs v. Mette*, 42 Mich. 12; s. c. 3 N. W. Repr. 291.

As to personal property and conditional sales, *Trudo v. Anderson*, 10 Mich. 357; s. c. 81 Am. Dec. 795; *Marquette v. Jeffrey*, 49 Mich. 283; s. c. 13 N.W. Repr. 592; *Smith v. Lozo*, 42 Mich. 6; s. c. 3 N.W. Repr. 227; Mechanics' liens have priority according to the time of filing notice. How. Stats., §§8377, 8378; Laws 1885, ch. 216, §3.

MINNESOTA.

§380. Effect of Record.

Conveyances of real property, unless duly recorded in the county where the real estate is situated, are void as against any subsequent purchaser in good faith and for a valuable consideration whose conveyance is first duly recorded, or as against any attachment levied on the property, or any judgment lawfully obtained at the suit of one against the person in whose name the record title was prior to the recording of the conveyance. The term "purchaser" includes every person to whom any interest in real estate is conveyed for a valuable consideration, and also every assignee of a mortgage, lease or other conditional estate. A certified copy of the record of a deed may be recorded in any county in the state with the same force and effect as the original conveyance would have if so recorded.¹ A recorded deed is made *prima facie* evidence without proof of execution.² A corporation authorized to hold real estate may convey the same by an agent appointed by vote for that purpose. A copy of the vote or resolution appointing an agent for such purpose, certified by the clerk or secretary of the corporation, should be recorded in the office of the register of deeds of the county where the land to which such vote relates is situated.³

¹ Rev. Stat., 1881, ch. 40, §§21-33; *Briggs v. Ripley*, 37 Minn. 78; s. c. 33 N. W. Repr. 120; *Lund v. Rice*, 9 Minn. 50; *Thorp v. Merrill*, 21 Minn. 136; *Conlan v. Grace*, 36 Minn. 281; *Wilder v. Brooks*, 10 Minn. 50; *Windom v. Schappell*, 38 N. W. Repr. 757; s. c. 27 Cent. Law Jour. 304; *Thorsen v. Perkins*, 40 N. W. Repr. 557; *Prescott v. Beyer*, 34 Minn. 493; s. c. 26 N. W. Repr. 732; *Cogan v. Cook*, 22 Minn. 137; *Morrison v. Porter*, 35 Minn. 425; s. c. 29 N. W. Repr. 54; *Gorham v. Summers*, 25 Minn. 81; *VanMeter v. Knight*, 32 Minn. 205; s. c. 20 N. W. Repr. 142.

If a county is unorganized, its place of record is the county to which it is attached for judicial purposes. *Smith v. Anderson*, 33 Minn. 25; s. c. 21 N. W. Repr. 841. Possession is notice. *New v. Wheaton*, 24 Minn. 406; *Palmer v. Bates*, 22 *Id.* 593.

Actual notice is effectual. *Morrison v. March*, 4 Minn. 422; *Groff v. Ramsey*, 19 Minn. 44; *McCarthy v. Grace*, 23 Minn. 182; *Duke v. Balme*, 16 *Id.* 306; *Wilson v. Minn. Fire Assn.*, 36 *Id.* 112; s. c. 30 N. W. Repr. 401; *First Natl. Bk. v. Loyhed*, 28 Minn. 396.

² Rev. Stat. (1881), ch 73, §67; *Ferris v. Boxell*, 34 Minn. 262; s. c. 25 N. W. Repr. 592. Town plats: *Subert v. Rosser*, 24 Minn. 155. Power of attorney: *Lowry v. Harris*, 12 Minn. 255. Executory contracts: *Thorsen v. Perkins*, 40 N. W. Repr. 557. Sheriffs' certificates: *Messersmith v. Baker*, 22 Minn. 81.

The recording of a deed is *prima facie* evidence of its delivery. *Nazro v. Ware*, 38 Minn. 443; s. c. 38 N. W. Repr. 359; *Conlan v. Grace*, 36 Minn. 281; s. c. 30 N. W. Repr. 880. Wills duly proved are to be recorded in the registry of deeds for the county, or counties, where the lands devised are situate. Ch. 47, §35.

³ Rev. Stat., 1881, ch. 40, §§2, 3, 4. The corporate seal should be attached to all deeds on behalf of the corporation. A quit-claim purchaser protected. Gen. Stats., ch. 40, §4. *Strong v. Lynn*, 38 Minn. 315; s. c. 37 N. W. Repr. 418. See *Martin v. Brown*, 4 Minn. 282.

§381. Mortgages of Realty are recorded as other conveyances of realty and with like effect. When a deed purports to be an absolute conveyance in terms, but is made, or intended to be made, defeasible by force of a deed of defeasance, or other instrument for that purpose, the original conveyance is not defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless the instrument of defeasance is recorded.¹ Mortgages may be discharged by an entry in the margin of the record signed by the mortgagee, his executor, administrator or assignee; and also by a certificate of discharge duly acknowledged and recorded. Neglect for the space of ten days, or in case of a non-resident of the state, for sixty days, to make a proper discharge renders the person so neglecting liable for all actual damages.²

¹ Rev. Stat., 1881, ch. 40, §23; *Stewart v. Smith*, 36 Minn. 82; s. c. 30 N. W. Repr. 430; see as to record of mortgages, *Whitacre v. Fuller*, 5 Minn. 508; *Jacoby v. Crowe*, 36 Minn. 93; *Bolles v. Carli*, 12 Minn. 113; *Gaston v. Merriam*, 33 Minn. 275; s. c. 22 N. W. Repr. 614; *Nazro v. Ware*, 38 Minn. 443; s. c. 38 N. W. Repr. 359; *Lash v. Edgerton*, 13 Minn. 210; *Koerper v. St. Paul Ry.*, 41 N. W. Repr. 656; *Gerdin v. Menage*, 43 N. W. Repr. 91.

The assignee of a mortgage cannot foreclose by advertisement under the statute unless the assignment has been recorded upon due acknowledgment. *Lowry v. Mayo*, 43 N. W. Repr. 78.

Deeds of trust, or mortgage upon railroads, to be recorded in the office of the secretary of state. Gen. Laws 1883, p. 66.

² Rev. Stat., 1881, ch. 40, §§36, 37; *Palmer v. Bates*, 22 Minn. 532; *Geib v. Reynolds*, 35 Minn. 331; s. c. 28 N. W. Repr. 923. See as to creditors and purchasers under the recording acts, *Greenleaf v. Edes*, 2 Minn.

264; Baze v. Arper, 6 Minn. 220; Lamberton v. Merchant's Bank, 24 Minn. 281; Coles v. Berryhill, 37 Minn. 58; s. c. 33 N. W. Repr. 213; Messerschmidt v. Baker, 22 Minn. 81.

§382. Acknowledgment may be made within the state before a judge of the Supreme, District or Probate Court, or clerk thereof, or clerk of the United States Circuit and District Courts for the district of Minnesota, a notary public, justice of the peace, register of deeds, court commissioner, county auditor, town clerk, city clerk, or recorder of a village; and where such officer has a seal he must affix it to his certificate.

Without the state and within the United States, before judges or clerks of the Supreme or District Courts of the United States, or of any court of record of the place where taken, justices of the peace, notaries public, or commissioners of deeds for Minnesota; such officers acting within their local jurisdiction, and their certificate, where they have no seal of office, shall be accompanied by the certificate of the clerk or other proper officer of a court of record of the county, district or place where taken, under his seal, as to the official character and genuine signature of the officer taking the acknowledgment.

In foreign countries, and in accordance with the law of such country, or with those of Minnesota, before any notary public, minister plenipotentiary, extraordinary or resident, *chargé d'affaires*, commissioner of deeds, or consul of the United States resident therein.¹ No separate acknowledgment is necessary as to the wife.² The certificate of acknowledgment may be as follows:

STATE OF..... }
COUNTY OF..... }

Be it known that on this.....day of....., A. D. 18.., before me personally appeared....., and....., his wife, to me known to be the individual persons described in and who executed the foregoing instrument, and

they acknowledged that they executed the same freely and voluntarily for the uses and purposes therein expressed.

Witness my hand and official seal, the day and year before written.

[SEAL.]

(Signature and title.)

A notary public must use his seal. Where the deed is made on behalf of a corporation, the certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

On this.....day of....., 18..., before me personally came (name and title of officer), to me well known to be the identical persons who executed the foregoing instrument for and in behalf of (insert name of corporation), and they duly acknowledged that they executed the same freely and voluntarily as such (insert official character of persons so executing), and as the act of said (name of corporation).

Witness my hand and official seal, this....day of.....

A. D. 18...

[SEAL.]

(Signature and title.)³

¹ Rev. Stat., 1881, ch. 40, §§8-32; Rev. Stat., 1881, ch. 72, §§11-13; Baze v. Arper, 6 Minn. 220; Thompson v. Scheid, 38 N. W. Repr. 81; Brunswick v. Brackett, 37 Minn. 58; s. c. 39 N. W. Repr. 214; Ferris v. Boxell, 34 Minn. 393; s. c. 25 N. W. Repr. 592. It is a sufficient filing for record that the instrument was delivered to the proper officer. Gorham v. Summers, 25 Minn. 81; Appleton Mill Co. v. Warder, 42 N. W. Repr. 791.

The certificate of acknowledgment is only *prima facie* evidence of its contents. Dodge v. Hollingshead, 6 Minn. 25; s. c. 80 Am. Dec. 433. The double certificate given a liberal construction. Wells v. Atkinson, 24 Minn. 161.

² Rev. Stat., 1881, ch. 40, §9; Gen. Laws 1889, p. 77. As to former law, see Edgerton v. Jones, 10 Minn. 427; Drury v. Foster, 2 Wall. 24. A married woman may contract as if *sole*, except that no contract or conveyance of real estate or of any interest therein except purchase money mortgages, and leases for a term of not more than three years, is valid unless the husband join with her in the conveyance. Gen. Stats., ch. 69, §§1-4; Laws 1869, p. 69; Laws 1878, p. 88.

³ Rev. Stat., 1881, ch. 40, §§2, 3. As to acknowledgment by an attorney in fact, see Laws 1883, p. 99, §2. Williams v. Livingston, 9 N. W. Repr. 31. As to indexing, Benton v. Nicholl, 24 Minn. 221.

§383. Proof by Witnesses.

Two subscribing witnesses are necessary to the deed, and without them its record does not impart notice.¹ Process may be issued for a grantor within the state to compel acknowledgment. Where the grantor dies, or is without the state, a deed may be proved by any competent witness thereto, or by proof of handwriting of deceased or absent subscribing witnesses, made before a court of record within the state. The statute does not provide for proof by witnesses without the state.²

¹ Rev. Stat., 1881, ch. 40, §7. *Thompson v. Morgan*, 6 Minn. 292; *Parrott v. Shaubhut*, 5 Minn. 323; s. c. 80 Am. Dec. 424; *Ross v. Worthington*, 11 Minn. 438; s. c. 88 Am. Dec. 95; *Moreland v. Lawrence*, 23 Minn. 84.

² Rev. Stat., 1881, ch. 40, §§11-13; *Morrison v. Porter*, 35 Minn. 425; s. c. 29 N. W. Repr. 54.

Deeds heretofore executed in other states or territory with only one subscribing witness, acknowledged by only one of the parties, are legal, but will not affect *bona fide* purchasers without notice. Gen. Laws 1883, p. 115.

§384. Chattel Mortgages not accompanied and followed by actual change of possession of the property, are absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless duly acknowledged and filed, or a true copy thereof, for record in the town or city where the property is at the time of execution, and also a copy in the town or city where the mortgagor resides. The record ceases to be effectual after two years, unless an affidavit of renewal is filed and annexed to the mortgage or copy on file, setting forth the then interest of the mortgagees in the property. Such renewals must be filed annually to preserve the lien. The chattel mortgage or copy remains on file, and a duly certified copy thereof may be given in evidence.¹ The statute provides for the registry of conditional sales of personal property;² and also for the filing of mechanics' liens in the office of the register of deeds within ninety days after performing the labor or furnishing the material.³

¹ Rev. Stat., 1881, ch. 39, §§1-5; Gen. Laws 1887, p. 110; Gen. Laws 1889, p. 68; *Strolberg v. Brandenburg*, 40 N. W. Repr. 356; *Ellinbor v.*

Brakken, 36 Minn. 156; s. c. 30 N. W. Repr. 659; McNeil v. Finnigan, 33 Minn. 375; s. c. 23 N. W. Repr. 540; Horton v. Williams, 21 Minn. 187; Gorham v. Summers, 25 Minn. 81; Moriarity v. Gullickson, 22 Minn. 39; Braley v. Bymes, 25 Minn. 297; Kellogg v. Olsen, 34 Minn. 103; s. c. 24 N. W. Repr. 364; Merrill v. Ressler, 37 Minn. 82; s. c. 5 Am. St. Rep. 822; 33 N. W. Repr. 117; Talbert v. Horton, 33 Minn. 104; s. c. 22 N. W. Repr. 126.

² Kinney v. Cay, 39 N. W. Repr. 140; Gen. Stats., ch. 39, §15.

³ Rev. Stat., 1881, ch. 90, §7; Gen. Laws 1883, p. 47; Gen. Laws 1887, pp. 282-3; Laws 1885, p. 102; Olsen v. Heath, 37 Minn. 298; s. c. 33 N. W. Repr. 791; Morrison v. Phillips, 35 Minn. 192; Merriman v. Bartlett, 34 Minn. 524; s. c. 26 N. W. Repr. 728; Coleman v. Ballandi, 22 Minn. 144.

MISSISSIPPI.

§385. Effect of Record.

All conveyances whatsoever of land and tenements, and marriage settlements, and all deeds of trust and mortgages whatsoever, shall be void as to all creditors, and subsequent purchasers for valuable consideration without notice, unless acknowledged or proved and lodged with the clerk of the chancery court of the proper county to be recorded; but the same as between the parties and their heirs, and as to all subsequent purchasers with notice, or without valuable consideration, shall nevertheless be valid and binding.¹ Conveyances take effect as notice from the time of delivery to the clerk.² Title bonds and other written contracts are entitled to record.³

¹ Code Miss. 1880, §1212; *Walter v. Hargrove*, 42 Miss. 18; s. c. 97 Am. Dec. 29; *Harkreader v. Clayton*, 56 Miss. 383; s. c. 31 Am. Rep. 369; *Harper v. Bibbs*, 34 Miss. 472; s. c. 69 Am. Dec. 397. Actual notice supplies want of registry. *Deason v. Taylor*, 53 Miss. 697; *Allen v. Poole*, 54 Miss. 323. Possession is notice. *Bratton v. Rogers*, 62 Miss. 281. Index books shall be prepared, and chancery clerk, after recording any deed, etc., shall index same. Laws 1884, ch. 99, pp. 98, 99; Laws 1888, ch. 15, pp. 35, 36.

² Code, §1213; *Marigold v. Barlow*, 61 Miss. 392; s. c. 48 Am. Rep. 84.

³ Code, §1214. Recording is *prima facie* evidence of delivery. *Metcalf v. Brandon*, 60 Miss. 685. The creditors are creditors of the grantor. *Miss. Valley Co. v. Chicago Ry. Co.*, 58 Miss. 846. Judgment creditors: *Nugent v. Priebatsch*, 61 Miss. 402; *Lissa v. Posey*, 64 Miss. 352; s. c. 1 South. Repr. 500.

§386. Mortgages of Realty are recorded with a like effect as deeds.¹ Purchase money mortgages are given preference over all judgments and debts against the mortgagor.² Satisfaction of mortgages may be entered on the margin of the record by the mortgagee, trustee, or *cestui que trust*, or his assignee or successor, or agent authorized in writing. Neglect to enter discharge or make release for three months after request, renders the person so neglecting liable in damages in any sum not exceeding the mortgage money.³

¹ Code, §1212; *Plant v. Shryock*, 62 Miss. 821; *Bank v. Tishamingo*, 62 Miss. 250.

² Code, §1205. Possession: *Hafter v. Strange*, 65 Miss. 323; s. c. 3 South. Repr. 190; *Loughbridge v. Bowland*, 52 Miss. 546. Actual notice: *Buck v. Paine*, 50 Miss. 648. Effect of record: *Price v. Martin*, 46 Miss. 489; *Baker v. Griffin*, 50 Miss. 158; *Everman v. Robb*, 52 Miss. 653.

³ Code, §1206; *Mairs v. Bank of Oxford*, 58 Miss. 919.

§387. Acknowledgment or proof may be made within the state before a judge of the supreme or circuit court, chancellor or clerk of a court of record, certifying under the seal of his court, justice of the peace or county supervisor.

Without the state and within the United States, before any judge of the supreme or district court of the United States, or of the supreme or superior court of any state or territory, notary public, clerk of a court of record having a seal, commissioner of deeds for Mississippi, or any justice of the peace whose official character shall be certified to under the seal of some court of record in his county.

In foreign countries, before any minister, *chargé d'affaires* or consul or secretary of legation of the United States resident therein, or judge of any court of record.¹

Since the Code of 1880, separate examination of the wife is not necessary. The certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

Personally appeared before me (name and title of officer) the within named A. B., and C. B., his wife, who acknowledged that they signed, sealed and delivered the foregoing deed (or other instrument as the case may be) on the day and year therein mentioned, as their act and deed.

Given under my hand (and official seal) this.....day of....., 18...

[SEAL.]

(Name and title).¹

- Code, §§1215, 1220. The certificate of acknowledgment must show the delivery of the instrument. §1218: *Toulman v. Heidleberg*, 32 Miss. 268; *Buntyn v. Shippers' Co.*, 63 Miss. 94. Officer may use initials in stating his title. *Russ v. Wingate*, 30 Miss. 440. As to separate acknowledgment of wife under former law, see *Love v. Taylor*, 26 Miss. 567; *Allen v. Lenoir*, 53 Miss. 321; *Crum v. Brown*, 63 Miss. 495; *Johnston v. Wallace*, 53 Miss. 331; s. c. 24 Am. Rep. 699; *Warren v. Brown*, 25 Miss. 66; s. c. 57 Am. Dec. 191.

§388. Proof by Subscribing Witnesses.

Deeds should be attested by two subscribing witnesses, one of whom may prove the instrument for record. If the grantor and witnesses be dead or absent so that his or their personal attendance cannot be had, then the handwriting may be proved.¹ The form of certificate of proof by a subscribing witness may be thus:

STATE OF..... }
COUNTY OF..... }

Personally appeared before me (name and title of officer) the within E. F., one of the subscribing witnesses to the foregoing deed (or other instrument), who being first duly sworn depose and saith that he saw the within named A. B., whose name is subscribed thereto, sign, seal and deliver the same to the said C. D. (or that he heard the said A. B. acknowledge that he signed, sealed and delivered the same to the said C. D.); that he, deponent, subscribed his name as a witness thereto in the presence of the said A. B., and that he saw the other subscribing witness (or witnesses) G. H. (and J. K., etc.) sign the same in the presence of the said A. B.; and that the witnesses signed in the presence of each other on the day and year therein named.

Given under my hand (and official seal) this the..... day of....., 18...

[SEAL.]

(Name and title).

¹ Error or omission in dating the certificate will not vitiate it. *Caruthers v. McLaran*, 56 Miss. 371.

² Code, §1218.

§389. Chattel Mortgages may be executed, acknowledged and recorded as other mortgages or trust deeds. If the property be removed to a different county, the mortgage must be recorded within such other county within twelve months after such removal, or it will be void as to purchasers for value without notice, and as to all creditors. Where property already mortgaged is removed into the

state, such mortgage is binding only from the time that it is properly recorded within the state. Growing crops and crops to be grown within fifteen months may be mortgaged.¹

¹ Code, §§1210, 1216, 1359; *Humphries v. Bartee*, 10 Sm. & M. 282; *Elsen v. Barrier*, 56 Miss. 394; *Barker v. Stacy*, 25 Miss. 471; *Kelly v. Reid*, 57 Miss. 89. As to conditional sales, see *Paine v. Halls*, 64 Miss. 175; s. c. 1 South. Repr. 56; and as to personal property, *Ketchum v. Brenham*, 53 Miss. 596; *Archibald v. Citizens' Bank*, 64 Miss. 523; s. c. 1 South. Repr. 739.

The creditors protected by the recording acts must be lien creditors. *Pickett v. Banks*, 11 Sm. & M. 446; *Lissa v. Posey*, 64 Miss. 352; *Perry v. Priebastch*, 61 Miss. 402; *Chaffe v. Halpin*, 62 Miss. 1; *Dixon v. Cook*, 47 Miss. 226; and see *Schumpert v. Dillard*, 55 Miss. 348; *Duke v. Clark*, 58 Miss. 475; *Anderson v. Miller*, 15 Miss. 586; *Kelly v. Mills*, 41 Miss. 267; *Dixon v. Doe*, 1 Sm. & M. 70; *Soule v. Shotwell*, 52 Miss. 236; *Henderson v. Downing*, 24 Miss. 106; *Harper v. Bibbs*, 34 Miss. 472; s. c. 69 Am. Dec. 397; *Boon v. Barnes*, 23 Miss. 136.

Notice, in order to affect a creditor, must be given before his lien attaches. *Loughridge v. Bowland*, 52 Miss. 546; *Pickett v. Banks*, *supra*; it comes too late after that time. *Taylor v. Doe*, 13 How. 287, and cases *supra*. A creditor purchasing under his own execution is protected by the registry statute, although, aside from the statute, an execution purchaser is not regarded as a *bona fide* purchaser for value. *Nugent v. Priebastch*, 61 Miss. 402, overruling *Simmons v. North*, 3 Sm. & M. 67.

See further as to the effect of record: *Claiborne v. Holmes*, 51 Miss. 146; *Meyers v. Buchanan*, 46 Miss. 397; *Hiller v. Jones* (Miss.), 6 South. Repr. 465; *Griffin v. Sheffield*, 38 Miss. 359; s. c. 77 Am. Dec. 646; *Chapman v. Sims*, 53 Miss. 163.

As to actual notice supplying registry: *Harrington v. Allen*, 48 Miss. 492; *Buck v. Paine*, 50 Miss. 648, 655; *Wailes v. Cooper*, 24 Miss. 208.

Possession as notice: *Strickland v. Kirk*, 51 Miss. 795; *Taylor v. Lowenstein*, 50 Miss. 278; *Ford v. Wilson*, 35 Miss. 504; *Taylor v. Moseley*, 57 Miss. 544; *Perkins v. Swank*, 43 Miss. 349.

Record of mortgages: *Excelsior Co. v. Keyser*, 62 Miss. 155; *Weathersby v. Weathersby*, 40 Miss. 462; s. c. 90 Am. Dec. 344.

Acknowledgments: *Smith v. Williams*, 38 Miss. 48; *Morse v. Clayton*, 21 Miss. 373; *Klein v. Richardson*, 64 Miss. 41; *Harmon v. Magee*, 57 Miss. 410; *Wasson v. Conner*, 54 Miss. 352; of married women, *Jones v. Gurtie*, 61 Miss. 423; *Upshaw v. Gibson*, 53 Miss. 341; *Sykes v. Sykes*, 49 Miss. 190; *Stone v. Montgomery*, 35 Miss. 83; *Kenneday v. Price*, 57 Miss. 771; *Willis v. Gattman*, 53 Miss. 721; *Bernard v. Elder*, 50 Miss. 336.

MISSOURI.

§390. Effect of Record.

Conveyances of realty duly certified and recorded shall from the time of filing the same with the recorder for record impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed in law and equity to purchase with notice thereof. No such instrument in writing shall be valid except between the parties thereto and such as have actual notice thereof until the same shall be deposited with the recorder for record.¹ The registry statute embraces revocations of powers of attorney, but not wills.²

¹ Rev. Stats., 1889, §§2419, 2420; Rev. Stats., 1879, §§692, 693; *Hagerman v. Shirley*, 88 Mo. 424; s. c. 5 S. W. Repr. 368; *Aubuchan v. Bender*, 44 Mo. 560; *Youngblood v. Vastine*, 46 Mo. 239; *Draude v. Rohrer*, 3 Mo. App. 249.

Actual notice supplies registry. *Maybee v. Moore*, 90 Mo. 340; s. c. 2 S. W. Repr. 471; *Speck v. Riggin*, 40 Mo. 405; *Maupin v. Emmons*, 47 Mo. 304; *Roberts v. Mosely*, 64 Mo. 407; *Reilly v. Hannibal*, 94 Mo. 600; s. c. 7 S. W. Repr. 407.

Possession is notice. *Vaughan v. Tracy*, 22 Mo. 415; s. c. 69 Am. Dec. 471; *Shumate v. Reavis*, 49 Mo. 333.

Record of a quit-claim deed does not charge notice of defective title. *Munson v. Ensor*, 94 Mo. 504; s. c. 7 S. W. Repr. 108; *Craig v. Zimmerman*, 87 Mo. 475; s. c. 56 Am. Rep. 466.

² Rev. Stats., 1889, §§2426, 2432. *Hagerman v. Sutton*, 91 Mo. 519; s. c. 4 S. W. Repr. 73. See as to *lis pendens*, *McIlwrath v. Hollander*, 73 Mo. 105; s. c. 39 Am. Rep. 484.

As to rights of creditors. *Sappington v. Oeschli*, 49 Mo. 244; *Draper v. Bryson*, 26 Mo. 108; s. c. 69 Am. Dec. 483; *Davis v. Ownsby*, 14 Mo. 170; s. c. 55 Am. Dec. 105; *Stillwell v. McDonald*, 39 Mo. 282.

As to purchasers and valuable consideration. *Lionberger v. Baker*, 88 Mo. 447; *Aubuchan v. Bender*, 44 Mo. 560; *Young v. Kellar*, 94 Mo. 581; s. c. 4 Am. St. Rep. 405; 7 S. W. Repr. 393.

§391. Mortgages of Realty are executed and recorded as other conveyances of real estate and with like effect. They may be discharged by an entry of satisfaction on the margin of the record or by deed of release. Such entry or deed of release may be made by the mortgagee or *cestui que trust*, or by an assignee, and it is not necessary that the trustee should join.¹ Neglect for thirty days after request and tender of cost to make such entry or release renders

the delinquent liable in damages to the extent of ten per cent. of the amount of the mortgage and any other actual damages.² Any attorney in fact to whom the money due has been paid has power to execute the release.³ Executors or administrators must release if the money was paid to the decedent in his life-time, and he failed to execute a release, and the penalty for a failure by them is the same as in case of neglect by a mortgagee.⁴

¹ Rev. Stats., 1889, §7094. *Turk v. Funk*, 68 Mo. 18; s. c. 30 Am. Rep. 771; *Lee v. Clark*, 89 Mo. 553; s. c. 1 S. W. Repr. 142; *Boatman's Sav. Bank v. Grewe*, 84 Mo. 478; *Logan v. Smith*, 62 Mo. 455.

² Rev. Stats., §7095. For measure of damages for refusal to release: *Verges v. Giboney*, 47 Mo. 171.

³ Rev. Stats., §7096; *Vallé v. Americus Iron Co.*, 27 Mo. 455.

⁴ Rev. Stats., §§70 98-7100.

§ 392. Acknowledgment or proof for record may be made within the state before a court having a seal, or some judge, justice or clerk thereof; notary public, or justice of the peace of the county where the real estate lies.

Without the state and within the United States, before a commissioner of deeds for Missouri, notary public, court of record of the United States or of any state or territory having a seal, or clerk of any such court.

In foreign countries, before any court of any state, kingdom or empire having a seal, or the mayor or chief officer of any city or town having an official seal, or before a minister or consular officer of the United States, or a notary public having a seal.¹

The certificate of acknowledgment is not conclusive.² Where made by a notary public of Missouri, it must give the date when his commission expires.³ The form of the ordinary certificate of acknowledgment is as follows:

STATE OF }
COUNTY OF..... } ss.

On this.....day of....., 18..., before me personally appeared A. B.* (or A. B. and C. D.), to me

known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

In witness whereof, etc.

(Official signature and title).

If the wife joins in the deed, add after the* “and M. B., his wife.” There is no requirement that the wife should be separately examined.

In the case of natural persons acting by attorney:

STATE OF }
COUNTY OF } ss.

On this.....day of....., 18.., before me personally appeared A. B., to me known to be the person who executed the foregoing instrument in behalf of C. D., and acknowledged that he executed the same as the free act and deed of said C. D.

In witness whereof, etc.

(Official signature and title).⁴ .

Certificate where identity is proven by two witnesses:

STATE OF..... }
COUNTY OF..... } ss.

On this.....day of....., 18.., before me personally appeared A. B., who is proven by the testimony on oath of E. F., residing at....., and G. H., residing at, two good and credible witnesses, to be the person described in and who executed the foregoing instrument, and said A. B. did acknowledge that he executed the same as his free act and deed.

In witness whereof, etc.

(Official signature and title).

Certificate where some of the parties are known and others proven:

STATE OF..... }
COUNTY OF..... } ss.

On this.....day of....., 18..., before me personally appeared A. B. and C. D., said A. B. being to me known to be one of the persons described in and who executed the foregoing instrument, and said C. D., being proven before me by the testimony on oath of E. F., residing at....., and G. H., residing at....., to be the other person described in and who executed the foregoing instrument, and said A. B. and C. D. acknowledged that they executed the same as their free act and deed.

In witness whereof, etc.

(Official signature and title).

In the case of corporations or joint stock associations:

STATE OF..... }
COUNTY OF..... } ss.

On this.....day of....., 18..., before me appeared A. B., to me personally known, who, being by me duly sworn (or affirmed) did say that he is the president (or other officer or agent of the corporation or association), of (describing the corporation or association), and that the seal affixed to said instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association), by authority of its board of directors (or trustees), and said A. B. acknowledged said instrument to be the free act and deed of said corporation (or association).

In witness whereof, etc.

(Official signature and title).

In the case of corporations or joint-stock associations having no corporate seal:

STATE OF..... }
COUNTY OF..... } ss.

On this.....day of....., 18..., before me appeared A. B., to me personally known, who, being by me

duly sworn (or affirmed) did say that he is the president (or other officer or agent of the corporation or association), of (describing the corporation or association), and that said instrument was signed and sealed in behalf of said corporation (or association), by authority of its board of directors (or trustees), and that said corporation (or association) has no corporate seal, and said A. B. acknowledged said instrument to be the free act and deed of said corporation (or association).

In witness whereof, etc.

(Official signature and title).⁵

¹ Rev. Stats., §2403; *Lincoln v. Thompson*, 75 Mo. 613; *Sidwell v. Burney*, 69 Mo. 144; *Gilbraith v. Gallwan*, 78 Mo. 452; *Gibbons v. Gentry*, 20 Mo. 468; *Sloan v. Owens*, 79 Mo. 206; *Dail v. Moore*, 51 Mo. 589; *Bennett v. Shipley*, 82 Mo. 448; *Siemers v. Kleburg*, 56 Mo. 196; *Gatewood v. Hart*, 58 Mo. 261; *Stevens v. Hampton*, 46 Mo. 404; *Bishop v. Schneider*, 46 Mo. 472; s. c. 2 Am. Rep. 533.

² Rev. Stats., §2429.

³ Rev. Stats., §1110; *Merchant's Bank v. Harrison*, 39 Mo. 430. An acting notary, not commissioned, is an officer *de facto*. *Hamilton v. Pitcher*, 53 Mo. 334.

⁴ Sheriffs' deeds are not effectual without acknowledgment. *Ryan v. Carr*, 46 Mo. 483; *Bishop v. Schneider*, 46 Mo. 472; s. c. 2 Am. Rep. 533; *Adams v. Buchanan*, 49 Mo. 64.

⁵ For acknowledgment on behalf of a corporation held sufficient under former law, see *Eppricht v. Nickerson*, 78 Mo. 483; and as to acknowledgment by an attorney in fact, see *Laws*, 1883, p. 20, §1.

§393. Acknowledgment of Married Women.

No privity examination of the wife is now required, either in conveyances of her separate property, or where she joins in a deed of the husband's lands in order to relinquish her dower.¹

¹ Rev. Stats., 1879, §680; Rev. Stats., 1889, §2408. For decisions under the former law (R. S. 1879), see *Belo v. Mayes*, 79 Mo. 67; *Rust v. Goff*, 94 Mo. 511; s. c. 7 S. W. Repr. 418; *Webb v. Webb*, 87 Mo. 510; *Bagby v. Emberson*, 79 Mo. 139.

§394. Proof by Witness.

Proof for record may be made by a subscribing witness. If all the subscribing witnesses are dead, or cannot be had, then proof can be made by at least two credible witnesses

proving the handwriting of the grantor, and two or more credible witnesses proving the handwriting of at least one of the subscribing witnesses. The certificate of proof by a subscribing witness may be thus:

STATE OF }
COUNTY OF } ss.

I (name, title and place of officer), duly commissioned and qualified, do hereby certify that on this.....day of, A. D. 18..., came before me at the county aforesaid, ..., who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a witness to the same (or proved to me, *etc.*, *etc.*, as above), and being by me first duly sworn, said that he was present and saw....., who is named in said deed as a party thereto, and whose name is thereto subscribed, execute the same, and heard him acknowledge the same to be his act and deed for the purposes therein mentioned, and that thereupon he, the said....., subscribed his name to said instrument as a witness thereof.

In witness whereof, I have hereunto set my hand and seal of office, the day and year aforesaid.

[SEAL.]

(Signature and title).

¹ Rev. Stats., 1879, §§682-687; Rev. Stats., 1889, §§2409-2414; Johnson v. Prewitt, 32 Mo. 553.

§395. Chattel Mortgages without possession of the property delivered, are not valid against any other person than the mortgagor, unless duly acknowledged or proved and recorded in the county in which the mortgagor resides.¹ Actual notice of a chattel mortgage is unavailing.² The statute requires registry of conditional sales.³

¹ Rev. Stats., 1879, §§2503, 2504; Rev. Stats., 1889, §§5176, 5177; White v. Graves, 68 Mo. 218; McDaniel v. Harris, 27 Mo. App. 545. Possession is equivalent to record. Nicholson v. Golden, 27 Mo. App. 132; Weber v. Armstrong, 70 Mo. 217. Comity of states enforced. Lafayette v. Metcalfe, 29 Mo. App. 384.

² Rawlins v. Bean, 80 Mo. 614; Hughes v. Menifee, 29 Mo. App. 192.

³ Rev. Stats., 1879, §2507; Rev. Stats., 1889, §5180; Peet v. Spencer, 90 Mo. 384; s. c. 2 S. W. Repr. 434; Coover v. Johnson, 86 Mo. 533.

MONTANA.

§396. Effect of Record.

Conveyances of real estate, and every instrument of writing setting forth an agreement to convey any real estate, to operate as notice to third persons, shall be recorded in the office of the county recorder, and shall impart notice from the time of filing, and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice. Every such conveyance hereafter made, which shall not be recorded, shall be deemed void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded.¹ A power of attorney containing power to convey any real estate shall be recorded, and the revocation of the same shall be deposited for record in the same office where the instrument containing the power is recorded.² The statute provides for registration of a list or schedule of the separate property of the wife with the register of deeds for the county wherein she resides.³ "Conveyance" embraces every instrument in writing by which any real estate, or interest therein, is created, alienated, mortgaged, or assigned, except wills, leases for a term not exceeding one year, and executory contracts for the sale or purchase of lands.⁴

¹ Compiled Statutes (1888), ch. xx, §§258-260; *Hackworth v. Damon*, 1 Mont. 235.

² Compiled Stats., ch. xx, §261. A purchaser by quit-claim not a *bona fide* purchaser. *McAdow v. Black*, 6 Mont. 601; s. c. 13 Pac. Repr. 377.

³ Comp. Stats., ch. LXXXVI, §§1432-1434; *Montana Co. v. Coulter*, 19 Pac. Repr. 216.

⁴ Comp. Stats., ch. xx, §270.

§397. Mortgages, Real and Chattel.

Mortgages of realty are recorded the same as deeds, and with a like effect. They may be discharged by an entry in the margin of the record or by a certificate of release duly acknowledged and recorded. Failure to make a proper discharge renders the party liable in the sum of one hundred

dollars and all actual damages.¹ Chattel mortgages, without delivery of the property, except where the mortgage provides that the property may remain in the possession of the mortgagor, are not valid against the rights of third persons, unless duly acknowledged and recorded in the county in which the mortgagor resides; if a non-resident, then in the county where the goods, chattels or personal property may be at the time of the execution of the mortgage. The record is good for one year and sixty days; renewals for one year.² Mechanics' liens must be filed with the county recorder of the county wherein the property is situated; if by the original contractor within ninety days after date of last item; the account, if by a sub-contractor, within thirty days after date of last item. They have priority over mortgage.³

¹ Compiled Statutes (1888), ch. xx, §272-275.

² Comp. Stats., ch. xcii, §§1538-1542; *Marcum v. Coleman*, 19 Pac. Repr. 394; *Butte v. Sullivan*, 7 Mont. 307; s. c. 16 Pac. Repr. 588; *Baker v. Power*, 7 Mont. 326; s. c. 16 Pac. Repr. 589. Possession is equivalent to record. *Silver Bow v. Lowry*, 6 Mont. 288; s. c. 12 Pac. Repr. 652.

³ Comp. Stats., ch. lxxxii, §§1371, 1376. See as to record of conditional sales, *Heinbockle v. Zugbaum*, 5 Mont. 344; s. c. 51 Am. Rep. 59; 5 Pac. Repr. 897.

§398. Acknowledgment or proof may be made within the state before some judge or clerk of a court having a seal, notary public or justice of the peace.

Without the state and within the United States, before some judge or clerk of any court of the United States, or of any state or territory having a seal, or by a notary public, or justice of the peace or commissioner of deeds for Montana. If taken by a justice of the peace, his official character must be certified to under seal by some court or officer within his county.

In foreign countries, before a notary public or United States consul.¹ The certificate of a single acknowledgment may be as follows:

STATE OF..... }
 COUNTY OF..... }

On this.....day of....., A. D. 18.., personally appeared before me (name and title of officer), in and for said county....., personally known to me (or satisfactorily proved to me by the oath of....., a competent witness, for that purpose by me duly sworn), to be the person described in and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.²

[SEAL.]

(Signature and title.)

Where a conveyance is executed by a corporation, the certificate should state that the corporate officer executing it was personally known as such officer, and that the instrument was executed freely, etc., as the act and deed of the corporation.

¹ Compiled Stats. (1888), ch. xx, §§238, 239.

² Comp. Stats., ch. xx, §§243, 244.

§399. Acknowledgment by Married Women.

The property of a married woman owned before marriage, and any acquired afterwards by gift, devise, descent, grant or otherwise, is her separate property, and is to be registered as such. She may become a sole trader by making, acknowledging and recording with the county recorder of deeds a declaration of her intention to do so, setting forth the nature of the business she intends to transact. She may make contracts and conveyances of real estate, either in person or by attorney.¹ The wife must be privily examined in the acknowledgment of conveyances executed by her. That part of the certificate relating to her separate acknowledgment may be as follows:

“And who, after being by me first made acquainted with the contents of said instrument, acknowledged to me, on examination separate and apart from and without the hearing of her said husband, that she executed the same freely

and voluntarily, without fear and compulsion, or under influence of her said husband, and that she does not wish to retract the execution of the same.’’²

¹ Comp. Stats. (1888), ch. LXXXVI, §1432.

² Comp. Stats., ch. XX, §257.

§400. Proof by Witness.

Proof of execution of any conveyance of real estate shall be by the testimony of a subscribing witness. When all subscribing witnesses are dead, or cannot be had, by evidence of the handwriting of the party and at least one subscribing witness.¹

¹ Compiled Statutes (1888), ch. XX, §246.

(36—Reg. of Title.) 561

§401. Effect of Record.

All deeds, mortgages and other instruments of writing which are required to be recorded shall take effect and be in force from and after the time of delivering the same to the clerk for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and they shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages and other instruments shall be first recorded.¹ The statute requires the registry of wills, defeasances and revocation of powers of attorney.² "Deed" embraces all instruments in writing by which real estate, or any interest therein, is created, alienated, mortgaged or assigned, except last wills, and leases for one year or less.³

¹ Comp. Stats. Neb., 1887. pp. 573-575; *Perkins v. Strong*, 22 Neb. 725; s. c. 36 N. W. Repr. 292; *Coggswell v. Griffith*, 23 Neb. 334; s. c. 36 N. W. Repr. 538; *Traphagen v. Irwin*, 18 Neb. 195; s. c. 24 N. W. Repr. 684; *Bennett v. Fowkes*, 1 Neb. 465; *Harrall v. Gray*, 10 Neb. 186; s. c. 4 N. W. Repr. 1040; *Harrison v. McWhorter*, 12 Neb. 152; s. c. 10 N. W. Repr. 545.

Possession is notice. *Uhl v. Rau*, 13 Neb. 357; *Lipp v. Land Syndicate*, 24 Neb. 692; s. c. 40 N. W. Repr. 101; *Conlee v. McDowell*, 15 Neb. 184; s. c. 18 N. W. Repr. 60.

² Comp. Stats., p. 575, §22, p. 579, §§47, 47a. An authenticated copy of the record of a power of attorney may be recorded with the same force and effect as the original. Comp. Stats., §47a.

Certificates of the register and receiver of any United States land office for entry or purchase of any tract of land, and letters patent of land from the United States, shall be recorded in the county in which the land lies. Comp. Stats., §62.

Actual notice supplies want of registry. *Whitehorn v. Cranz*, 20 Neb. 392; s. c. 30 N. W. Repr. 406. Indexing held essential. *Metz v. State Bank*, 7 Neb. 165.

As to creditors and purchasers under the recording acts, see *Mansfield v. Gregory*, 8 Neb. 432; s. c. 9 N. W. Repr. 87; *Harrall v. Gray*, *supra*; *Hubbard v. Walker*, 19 Neb. 94; s. c. 26 N. W. Repr. 713; *Webb v. Hoselton*, 4 Neb. 308; *Brophy v. Brophy*, 15 Neb. 101; *Snowden v. Tyler*, 21 Neb. 199; s. c. 31 N. W. Repr. 661; *Studebaker v. McCurgur*, 20 Neb. 500; s. c. 30 N. W. Repr. 680.

³ Comp. Stats., p. 578, §46.

§402. Mortgages of Realty.

Mortgages and absolute deeds intended to operate as such must be recorded in books kept for the purpose. Where a

deed absolute in terms is intended and shown by some other instrument in writing to be intended as only a security or mortgage, the person for whose benefit the deed is made derives no advantage from its record, unless the defeasance is also recorded therewith.¹ The record of an assignment of a mortgage is not of itself notice to the mortgagor.² The wife cannot claim dower as against a purchase money mortgage, though not executed by her. A mortgage of the homestead is good if executed by both husband and wife.³ In the absence of stipulations to the contrary, the mortgagor has the legal title and the right of possession. Mortgages may be discharged by an entry in the margin of the record, or by a certificate of discharge duly acknowledged and recorded. Neglect for seven days after request to make a proper discharge, renders the party liable in damages in the sum of one hundred dollars and all actual damages.⁴

¹ Comp. Stats. (1887), pp. 574, 575. The mortgagee has the right to pay taxes and add the amount to his debt. Comp. Stats., p. 626. The only foreclosure of mortgages is by sale on decree of court. Comp. Stats., p. 835, title "Foreclosure."

² Comp. Stats., p. 577. The record of the mortgage remains effectual, though an assignment thereof be not recorded. *Bridges v. Bidwell*, 20 Neb. 185; s. c. 29 N. W. Repr. 302.

³ Comp. Stats., p. 339, §4; p. 452, §4. As to priority in the record of mortgages, see *Galway v. Malchow*, 7 Neb. 289; *Merriman v. Hyde*, 9 Neb. 120; s. c. 2 N. W. Repr. 218.

⁴ Comp. Stats., p. 579, §55; p. 576, §§26-29. Deeds of trust to secure payment of money are considered and treated as mortgages. Comp. Stats., pp. 575, 576.

§403. Acknowledgment or proof for record may be made in the state before judges, clerks of courts, justices of the peace and notaries public, acting within their local jurisdictions.

Without the state and within the United States, and in conformity to the law where made, before any officer authorized by the law of the place to take acknowledgments, or before a commissioner of deeds for Nebraska. Where the officer has no seal, there must be a further cer-

tificate of a clerk of a court of record, or other proper officer of the district, under official seal, that the officer taking the acknowledgment was the same as represented therein at the date thereof, that the signature is genuine, and the acknowledgment in conformity to law.¹

In foreign countries and in accordance with the laws thereof, before a notary public, or any ministerial officer, commercial agent or consul of the United States appointed to reside therein.

A married woman may convey her real estate and contract with reference thereto in the same manner and with like effect as a married man.² Deeds should state relinquishment of the right of dower, but the certificate of acknowledgment need not. No separate examination of the wife is necessary.³ The certificate of joint acknowledgment may be as follows:

STATE OF }
COUNTY OF }

On this.....day of....., A. D., 18..., before me (name and title of officer), duly appointed, commissioned (or duly elected) and qualified for, and residing in, said county, personally appeared....., and....., his wife, to me personally known (or by the oaths of one or more witnesses, whose names are hereto subscribed, satisfactorily proved) to be the identical persons described in, and whose names are affixed to, the foregoing conveyance as grantors, and they severally acknowledged the same to be their voluntary act and deed.

In testimony whereof, I have hereunto set my hand and official seal at....., in said county, the day and year last above written.

[SEAL.]

(Signature and title.)⁴

¹ Comp. Stats. (1887), pp. 572, 573, §§3-6. Without the double certificate the record is ineffectual. *Irwin v. Welsh*, 10 Neb. 479; s. c. 6 N. W. Repr. 753; *O'Brien v. Gaslin*, 20 Neb. 347; s. c. 30 N. W. Repr. 274.

Where an acknowledgment purports to have been taken by an officer using a seal, and the certificate recites that it is under his hand and seal of office, the record will be effectual, and it shall be presumed that a seal was attached to the original. Comp. Stats., p. 575, §20.

² Comp. Stats., pp. 573, 574, §§7-10. Laws 1887, p. 478.

³ Comp. Stats., p. 578, §42; Hale v. Christy, 8 Neb. 264.

⁴ Comp. Stats., p. 574, §§1, 2, 12; Harrison v. McWhorter, 12 Neb. 152; s. c. 10 N. W. Repr. 545. The certificate must be recorded with the deed, and deeds are not deemed lawfully recorded unless previously acknowledged or proved. pp. 574, 575, §§14, 17.

The statute as to the name of a notary being engraved on his seal, held only directory. Village of Weeping Water v. Reed, 21 Neb. 261; s. c. 31 N. W. Repr. 797.

The laws of 1887, p. 362, provide for the election of registers of deeds in all counties having at least 18,000 population, such registers to perform the duties relative to the record of conveyances of real estate theretofore enjoined by law on county clerks.

Corporations may convey lands by deed sealed with the common seal of the corporation, and signed by the president or presiding officer of the board of directors of the corporation; and such deed, when acknowledged by such officer to be the act of the corporation, or proved in the usual form prescribed for other conveyances of lands, shall be recorded in like manner as other deeds. Comp. Stats., p. 257, §137.

§404. Proof by Witnesses.

Deeds require at least one subscribing witness, and may be proved for record by such a witness in cases where the grantor is dead, or refuses to acknowledge, or his attendance cannot be procured for that purpose. Such proof shall not be taken unless the officer is personally acquainted with the witness, or has satisfactory evidence that he is the same person who was a subscribing witness to the deed.¹ Where the attesting witnesses are dead or absent, proof of handwriting may be resorted to.²

The certificate of proof by a subscribing witness may be as follows:

STATE OF..... }
COUNTY OF..... }

On this.....day of....., A. D. 18..., it satisfactorily appearing to me that the attendance of the said John Smith, the grantor in the foregoing conveyance, cannot be procured in order to make acknowledgment thereof (or

that the said John Smith, the grantor, etc., is dead, or, having executed and delivered the foregoing conveyance, refuses to make acknowledgment thereof), before me (here insert name and title of officer), duly appointed, commissioned and qualified for, and residing in, said county, personally appeared John Brown, to me personally known (or by the oath of [one or more] witness, whose name is hereto subscribed, to me satisfactorily proved) to be the identical person whose name is subscribed to the foregoing conveyance as attesting witness, who being first duly sworn, on his oath says that his place of residence is at....., in the county of....., and state of.....; that he set his name to the foregoing conveyance as a witness; that he knew John Smith, the grantor in said conveyance, and that he knew John Smith to be the identical person described therein, who executed the same, and saw him sign (or heard him acknowledge that he had signed) the same.

In testimony whereof, etc.

¹ Comp. Stats. (1887), p. 572. The witness must have no certain legal interest in the land conveyed. *Child v. Baker*, 24 Neb. 188; s. c. 38 N. W. Repr. 769.

² Comp. Stats., pp. 573, 574. The use of private seals upon all deeds, mortgages, leases, etc., is hereby abolished, but the addition of a private seal to any such instrument shall not affect its equity or legality. Comp. Stats., p. 688, §1.

§405. Chattel Mortgages without change of possession of the property, are absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless filed, or a true copy thereof, for record in the county where the mortgagor resides, or if he be a non-resident of the state, in the county where the property may be, and the filing remains good for five years. They need not be acknowledged. As between the parties, a chattel mortgage need not be in writing. They are discharged of record by an entry on the margin, attested by the clerk; or by the clerk on receipt of an or-

der in writing, signed by the mortgagee, and attested by a justice of the peace, or some officer with a seal.¹ Conditional sales must also be recorded and the instrument re-filed within thirty days next preceding five years.² Mechanics' liens must be filed in the office of the register of deeds within four months after the materials are furnished, or the work is done, and the lien continues for two years from the filing.³

¹ Comp. Stats. (1887), pp. 443, 444; *Price v. McComas*, 21 Neb. 193; s. c. 31 N. W. Repr. 511; *Burley v. Marsh*, 11 Neb. 291; s. c. 9 N. W. Repr. 48; *Hooker v. Hammill*, 7 Neb. 231; *Pyle v. Warren*, 2 Neb. 241; *Brunswick v. Clay*, 7 Neb. 137; *Grimes v. Connell*, 23 Neb. 187; s. c. 36 N. W. Repr. 439; *Cole v. Kerr*, 19 Neb. 553; s. c. 26 N. W. Repr. 598; *Word v. Watson*, 24 Neb. 592; *Loeb v. Hirsch*, 21 Neb. 392; *Ransom v. Schmela*, 13 Neb. 77; s. c. 12 N. W. Repr. 926; *Cool v. Roche*, 20 Neb. 550; *Peters v. Parsons*, 18 Neb. 191; s. c. 24 N. W. Repr. 687; *Lorton v. Fowles*, 18 Neb. 224; *Wiley v. Shars*, 21 Neb. 712; s. c. 33 N. W. Repr. 418; *Ex parte Jane Thomason*, 16 Neb. 238.

² Comp. Stats., pp. 445, 446.

³ Comp. Stats., pp. 506, 507; Laws 1881, pp. 259, 266; Laws 1885, p. 275; *White Lake Co. v. Russell*, 22 Neb. 126; s. c. 3 Am. St. Rep. 262; 34 N. W. Repr. 104; *Hays v. Mercier*, 22 Neb. 656; s. c. 35 N. W. Repr. 894.

NEVADA.

§406. Effect of Record.

Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate, or whereby any real estate may be affected, proved, acknowledged and certified in the manner prescribed in this act, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such record. The record imparts notice from the time of filing. Every conveyance not so recorded is void as against a subsequent purchaser in good faith and for valuable consideration, of the same real estate, whose conveyance shall be first duly recorded.¹ The term "conveyance" includes every instrument in writing, except a last will and testament by which any estate or interest in lands is created, aliened, assigned or surrendered.² A revocation of a recorded power of attorney must also be recorded.³

¹ General Statutes (1885), §§2594, 2595; *Allison v. Hagan*, 12 Nev. 38; *Virgin v. Brubaker*, 4 Nev. 31; *Crosier v. McLaughlin*, 1 Nev. 348.

Actual notice supplies want of registry. *Grellet v. Heilshorn*, 4 Nev. 526; *Gilson v. Boston*, 11 Nev. 413.

² Gen. Stats., §2644. Possession is notice. *Brophy Mining Co. v. Brophy & Dale G. & S. Co.*, 15 Nev. 101.

³ Gen. Stats., §2596; *Arnold v. Stevenson*, 2 Nev. 234. There is no statutory regulation of the manner in which conveyances by corporations shall be made. A deed by the president and secretary of the company, under its corporate seal, and pursuing the authority of a resolution of the board of directors or trustees, is held sufficient. As to record of bond for title, see *Irvin v. Hawkins*, 22 Pac. Repr. 240.

Conveyances of mining claims shall hereafter require the same formalities and be subject to the same rules of construction as the transfers and conveyances of other real estate. Gen. Stats., §2650.

All instruments of writing now copied in the proper books of record of the office of the county recorders shall, from this time, impart notice to subsequent purchasers and incumbrancers, and all other persons, of all deeds, mortgages, powers of attorney, contracts, conveyances, or other instruments of writing, notwithstanding any defect, omission, or informality existing in the execution, acknowledgment, or certificate of recording the same. The above shall not affect rights heretofore acquired in the hands of subsequent grantees or assignees. Gen. Stats., §2648 (supplemental act).

The mining recorder shall forward a "duplicate" copy of mining claim notices to county recorder in which the mining district is located. Stats. 1885, p. 27; Stats. 1887, p. 136.

§407. Mortgages, Real and Chattel.

Mortgages of realty are recorded as other conveyances of real estate and with like effect.¹ They may be discharged by entry in the margin of the record, or by certificate duly acknowledged and recorded. Neglect for seven days after request to execute a release, renders the person whose duty it is to do this liable in the sum of one hundred dollars, and also for all actual damages. Chattel mortgages are not valid against any other person than the parties thereto, unless possession of the property be delivered to and retained by the mortgagor, or the mortgage be duly recorded in the county where the property is situated and also where the mortgagor resides. Mortgages upon growing crops are valid without delivery of possession, if duly acknowledged and recorded in the county where the property is situate. An affidavit of good faith, setting forth that the mortgage is given for a debt actually owing from the mortgagor, stating the amount and character of the debt, and that the same is not made or received with intent to hinder, delay or defraud any creditor of the mortgagor, is required, and is to be made by both the mortgagor and mortgagee, or some person in their behalf. The lien of a crop mortgage continues until after the crop has been harvested, threshed and delivered to the order of the mortgagee.²

¹ Gen. Stats. (1885), §2594; Laws 1881, ch. 12. A deed absolute in terms, though really a mortgage, is recordable as a deed. *Grellet v. Heilshorn*, 4 Nev. 526. As to record of purchase money mortgages, see *Virgin v. Brubaker*, 4 Nev. 31. A mortgage is not to be deemed such a conveyance as will enable the mortgagee to recover possession of mortgaged real estate without a foreclosure and sale. It is only necessary that the mortgagee join in the discharge of a mortgage.

² Gen. Stats., §2635; Stats. (1887), p. 66; *Gass v. Hampton*, 16 Nev. 189; *Clute v. Steele*, 6 Nev. 335; *Bryant v. Carson*, 3 Nev. 313; s. c. 93 Am. Dec. 403

If a crop mortgage be executed before the crop is planted, it shall be expressed in the mortgage that the same shall take effect upon the crops when planted. The mortgage is not valid if given for a less sum than one hundred dollars.

§408. Acknowledgment or proof may be made within the state before a judge or clerk of a court having a seal, a notary public or justice of the peace. When taken by a justice of the peace in any other county than that in which the real estate is situated, his official character and genuine signature must be certified to by the clerk of the district court.

Without the state and within the United States, before the above officers or a commissioner of deeds for Nevada, and if taken by a justice of the peace, his official character and genuine signature must be certified by the clerk of a court of record of the county having a seal.

In foreign countries, before a judge or clerk of a court of a state, kingdom or empire having a seal, or a notary public therein, or by a minister, commissioner or consul of the United States appointed to reside therein. The certificate must be under official seal when taken by a judge or clerk, or an officer having a seal of office.¹

¹ Gen. Stats. (1885), §2572. Substantial compliance is sufficient. *Johnson v. Badger Co.*, 13 Nev. 351. Omission of "voluntary" held fatal. *Spitznagle v. Vanbessch*, 13 Nev. 338.

If the grantor is unknown, his identity must be proven to the officer by the oath of a credible and competent witness. No additional certificate of any kind is required to the certificate of a notary public wherever taken.

§409. Acknowledgment of Married Women.

Estates by curtesy and dower do not exist. The husband has absolute control of the community property during the existence of the marriage relation, and may dispose of it as his own separate estate. The wife may convey, charge, incumber or in any manner dispose of her own separate property.¹ Separate examination of the wife is required, and her deed cannot be proved for record by a witness. The form of joint certificate may be as follows:

STATE OF..... }
 COUNTY OF..... }

On this.....day of....., A. D.; 18...., personally appeared before me (name and title of officer), in and for said city and county, ...and....., his wife, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the individuals described in and who executed the said annexed instrument as parties thereto, who each acknowledged to me that they, each of them respectively, executed the same freely and voluntarily and for the uses and purposes therein mentioned; and the said....., wife of the said....., having been by me first made acquainted with the contents of said instrument, acknowledged to me, on examination apart from and without the hearing of her said husband, that she executed the same freely and voluntarily without fear or compulsion or undue influence of her said husband, and that she does not wish to retract the execution of the same.

In witness whereof, I have hereunto set my hand (and affixed my official seal), the day and year first above written.

[SEAL.]

(Signature and title).²

¹ Gen. Stats. (1885), §§505-507.

² Gen. Stats., §§2590, 2591. All property owned by the wife before marriage, and that acquired afterwards by gift, bequest, devise or descent, is her separate property. After marriage her separate property continues liable for her debts contracted before marriage.

§410. Proof by Witnesses.

Witnesses are not required except where the signature of the contracting party is made by "mark," where one witness will suffice. Proof of the execution of a conveyance may be made before any officer authorized to take acknowledgments by the testimony of a subscribing witness, or when all the subscribing witnesses are dead, or cannot be had, by evidence of the handwriting of the party and of at least one subscribing witness, given by a credible witness

to each signature under oath.¹ The certificate of proof by a subscribing witness must state that the witness was personally known to the officer as the person whose name is subscribed to the instrument as a witness, or was proved to be such by the oath of a witness whose name shall be given in the certificate; and must further state that the proof given by the witness of the execution of the instrument, and of the fact that the person whose name is subscribed as the grantor, is the person who executed the instrument, and that the witness subscribed his name to the instrument as a witness thereof.

¹ Gen. Stats., §§2576-2583.

NEW HAMPSHIRE.

§411. Effect of Record.

Deeds, mortgages, conveyances of real estate, and leases for more than seven years, are not valid against any person but the grantor and his heirs only, unless attested, acknowledged and recorded in the office of the register of deeds for the county wherein the property is situated.¹ Powers of attorney are to be recorded as deeds. Conveyances not acknowledged may be provisionally recorded for sixty days with the effect of notice. Process to the grantor to compel acknowledgment is authorized.² Conveyances of real estate must be under seal, and a scroll is not a sufficient seal. Any public or private corporation authorized to hold real estate may convey the same by any agent selected for that purpose.³

¹ Gen. Laws N. H., 1878, ch. 135, §4; *Bell v. Twilight*, 22 N. H. 500; s. c. 45 Am. Dec. 307; *Wark v. Willard*, 13 N. H. 389; *Stevens v. Morse*, 47 N. H. 532; *Arlin v. Brown*, 44 N. H. 102; *Bullock v. Wallingford*, 55 N. H. 619; *Brown v. Simons*, 44 N. H. 478.

Filing is notice. *Converse v. Porter*, 45 N. H. 400. Actual notice is effectual. *Hart v. Russell*, 56 N. H. 559; *Tucker v. Tilton*, 55 N. H. 223; *Patten v. Ins. Co.*, 40 N. H. 375; *Brown v. Manter*, 22 N. H. 463; *Nute v. Nute*, 41 N. H. 60; *Stowe v. Meserve*, 13 N. H. 46; *Rogers v. Jones*, 8 N. H. 264; *Hovey v. Blanchard*, 13 N. H. 145; *Hastings v. Cutler*, 24 N. H. 481; *Warner v. Swett*, 31 N. H. 332.

² Gen. Laws, ch. 135, §§7, 10, 11. Possession is notice. See *Emmons v. Murray*, 16 N. H. 398; *Patten v. Moore*, 32 N. H. 382; *Frost v. Jackson*, 56 N. H. 357; *Great Falls Co. v. Worcester*, 15 N. H. 412; *Bell v. Twilight*, *supra*.

³ As to proof for record of a corporation deed, see *Tenney v. East Warren*, 43 N. H. 343. A waiver of will and release of dower shall be recorded. Laws 1883, p. 22.

§412. Mortgages of Realty are recorded as other conveyances of real estate, and with like effect. A condition of defeasance is not effectual unless it is inserted in the mortgage instrument and made part of it, and the condition must state the sum of money secured or other thing to be performed.¹ Mortgages are discharged by release, or if that cannot be obtained, by a decree of discharge of the supreme court of the county.²

¹ Gen. Laws, ch. 136, §2; *Darling v. Wilson*, 60 N. H. 59; *Sanborn v. Robinson*, 54 N. H. 239.

² Gen. Laws, ch. 136, §§4-7. Mortgages of realty are discharged by the mortgagee writing upon the back thereof the date, and the words: "I discharge the within mortgage," and signing the same. This discharge should be recorded upon the margin of the record of the mortgage in the registry of deeds.

§413. Acknowledgment may be made within the state before a justice of the peace, notary public or commissioner; without the state and within the United States, before a justice of the peace, notary public or commissioner of deeds for New Hampshire. If taken before a justice of the peace without the state, his official character must be authenticated by the clerk of a court of record or by the secretary of state.

In foreign countries, before a minister or consul of the United States in such country.

No separate acknowledgment is required to be made by the wife. Where the real estate conveyed belongs to the wife in her own right, it is advisable that the husband join in the conveyance, so as to bar his rights of curtesy and homestead. If the wife's only interest is dower, the deed should contain a release of dower, and the wife should sign it, but need not acknowledge it. If the wife has also a homestead right, the deed should contain a release of that, and she should sign and acknowledge it the same as the husband. The identity of the grantors need not be certified. The form of joint certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

Personally appeared the above named.....and....., his wife, and acknowledged the foregoing instrument to be their voluntary act and deed.

Before me, this.....day of....., 18...

[SEAL.]

(Signature and title).¹

¹ Gen. Laws, ch. 135; ch. 183, §12; Prescott v. Hayes, 42 N. H. 56; Wark v. Willard, 22 N. H. 468; Odiorne v. Mason, 9 N. H. 24.

§414. Proof by Witnesses.

Two witnesses are necessary to the validity of the deed and its record.¹ Where the grantor dies, becomes insane or is out of the state, proof for record may be made by one or more of the subscribing witnesses before a court of record within the state.²

¹ Gen. Laws, ch. 135, §3; *Kingsley v. Holbrook*, 45 N. H. 320; *Hastings v. Cutler*, 24 N. H. 481; *French v. French*, 3 N. H. 234.

² Gen. Laws, ch. 135, §§8, 9.

§415. Chattel Mortgages not accompanied by change of possession of the property are not valid against any person except the mortgagor, unless the mortgage is sworn to and recorded in the town in which the mortgagor resides, or if he be a non-resident of the state, in which the property is situate.¹ An affidavit of good faith and just debt is essentially necessary to the mortgage.² The form of the affidavit is as follows: "We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof, and for no other purpose whatever, and that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage, but is a just debt, honestly due and owing from the mortgagor to the mortgagee. So help us God." Conditional sales, in order to preserve the lien of the vendor, must be recorded with an affidavit similar in effect to the foregoing one.³

¹ Gen. Laws, ch. 137, §§2-16; *Jauvrin v. Fogg*, 49 N. H. 340; *Hyde v. Noble*, 13 N. H. 494; s. c. 32 Am. Dec. 538; *Page v. Ordway*, 40 N. H. 253; *Lathe v. Schaff*, 60 N. H. 34; *Low v. Pettingill*, 12 N. H. 337; *Ferguson v. Clifford*, 37 N. H. 86.

² *Lowell v. Osgood*, 60 N. H. 71; *Phillips v. Johnson*, 64 N. H. 393; s. c. 10 Atl. Repr. 819; *Stone v. Manvel*, 45 N. H. 481.

³ Laws 1885, ch. 30; Laws 1887, ch. 29; *King v. Bates*, 57 N. H. 446; *Farley v. Lincoln*, 51 N. H. 379; s. c. 12 Am. Rep. 182. The statute applies where the possession of the property passes to the conditional vendee. The memorandum of lien reserved should be recorded within twenty days after the delivery of the property.

NEW JERSEY.

§416. Effect of Record.

Conveyances of realty are void until they are recorded in the county where the lands lie, as against all subsequent judgment creditors without notice, and against all subsequent *bona fide* purchasers or mortgagees for a valuable consideration, not having notice thereof, whose deed or mortgage has been first duly recorded or registered.¹ In the counties of Essex, Camden and Hudson the records are kept by a register; in the other counties by the clerk of the county. Leases for more than ten years, or assignments or mortgages thereof, not recorded within fifteen days after sealing and delivering the same, are void as against a subsequent judgment creditor or *bona fide* purchaser or mortgagee without notice, but are valid as between the parties.² Conveyances must be under seal, and a scroll is not sufficient.³ The husband and wife must join in a conveyance of the estate or right of dower of the wife, and in a deed of the wife's land.⁴

Revision of 1877, p. 155. *Conveyances*, §14, as amended by Act of March 23, 1883; Voorhis v. Westervelt, 43 N. J. Eq. 642; s. c. 3 Am. St. Rep. 315; 12 Atl. Repr. 533; Gale v. Morris, 29 N. J. Eq. 222; Losey v. Simpson, 11 N. J. Eq. 346; Coleman v. Barklew, 3 Dutch. 357; Read v. Richman, 1 Greene, 49; Westervelt v. Wyckoff, 32 N. J. Eq. 188; Ledos v. Kupfrian, 28 N. J. Eq. 161; Corlies v. Howland, 26 N. J. Eq. 311; Den v. Richman, 1 Greene (13 N. J. Law), 43; Smith v. Vreeland, 10 N. J. Eq. 199; Spielman v. Kliet, 36 N. J. Eq. 199; Barnes v. Trenton, 27 N. J. Eq. 33; Willink v. Miles, 4 N. J. Eq. 277; Deane v. Hutchinson, 40 N. J. Eq. 83.

² Rev., p. 187, §19, as amended by Act of April 21, 1887; Decker v. Clarke, 26 N. J. Eq. 163; Hutchinson v. Bramhall, 42 N. J. Eq. 372; Spielman v. Kliet, *supra*.

Actual notice supplies the want of registry. Garwood v. Garwood, 4 Halst. 193; Morvis v. White, 36 N. J. Eq. 324; Hoy v. Bramhall, 19 N. J. Eq. 593; s. c. 97 Am. Dec. 687; Danbury v. Robinson, 1 McCart. 213; s. c. 82 Am. Dec. 244; Raritan Water Co. v. Veghte, 21 N. J. Eq. 463.

³ Rev., 1877. *Conveyances*. Possession is notice: Hodge v. Ammerman, 40 N. J. Eq. 99; s. c. 2 Atl. Repr. 257; Roll v. Rea, 50 N. J. L. 266; s. c. 12 Atl. Repr. 905; Foulke v. Bond, 12 Vroom, 527; Holmes v. Stout, 10 N. J. Eq. 419; Groton Sav. Bk. v. Beatty, 30 N. J. Eq. 133; and is not notice when: Van Keuren v. Cent. Ry. Co., 38 N. J. L. 165; Coleman v. Barklew, 27 N. J. L. 357.

Rev., pp. 638-640, *Married Women*, §§14, 15; Laws 1881, ch. 136. As to record of plat, see Point Pleasant v. Cranmer, 40 N. J. Eq. 81.

§417. Mortgages of Realty.

A mortgage has no effect against a subsequent judgment creditor, a *bona fide* purchaser or mortgagee for a valuable consideration without notice, unless recorded at or before the time of such judgment or of lodging with the clerk for record of such subsequent mortgage or conveyance.¹ Where a recorded deed absolute in term appears by any other writing to be intended as a mortgage, the grantee is not entitled to the benefits given by recording to a mortgagee, unless the defeasance, or an abstract of such writing, be registered with the deed.² Mortgages are discharged by an entry in the margin of the record by the clerk, upon application made by the mortgagor, or person paying and redeeming the mortgage, and producing to the clerk the mortgage canceled, or a receipt thereon, signed by the mortgagee, his heirs, executors, administrators or assigns, or a certificate signed by him or them, and acknowledged, or proved and certified as in case of deeds, specifying that the mortgage has been paid or otherwise satisfied and discharged.

¹ Rev., title *Mortgages*, pp. 705, 706, §22; *Clement v. Bartlett*, 33 N. J. Eq. 43; *Den v. Wade*, 20 N. J. L. 291; *Bingham v. Kirtland*, 34 N. J. Eq. 229; *Boyd v. Mundorf*, 30 N. J. Eq. 545; *Semon v. Terhune*, 40 N. J. Eq. 364; s. c. 2 Atl. Repr. 18; *Cogswell v. Stout*, 32 N. J. Eq. 240; *Ganssen v. Tomlinson*, 23 N. J. Eq. 405; *Vredenburg v. Burnett*, 31 N. J. Eq. 229; *Westervelt v. Voorhis*, 42 N. J. Eq. 179.

² Rev., title *Mortgages*, §21; *Den v. Wade*, 20 N. J. L. 291; *Heyder v. Excelsior Ass'n*, 42 N. J. Eq. 403; s. c. 59 Am. Rep. 59; 8 Atl. Repr. 310; *Hutchinson v. Swartseller*, 31 N. J. Eq. 205.

Revision, p. 707. See as to assignment of mortgages, *Stein v. Sullivan*, 31 N. J. Eq. 409; and as to creditors and purchasers under the recording acts, *Wheeler v. Kirtland*, 24 N. J. Eq. 552; *Herbert v. Mechanic's Ass'n*, 2 C. E. Green, 497; s. c. 90 Am. Dec. 601; *Condit v. Wilson*, 36 N. J. Eq. 370; *Sharp v. Shea*, 32 N. J. Eq. 65; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Phelps v. Morrison*, 24 N. J. Eq. 195; *Pancoast v. Duval*, 26 N. J. Eq. 445; *Sayre v. Hewes*, 32 N. J. Eq. 652; *Williamson v. N. J. South. Ry. Co.*, 29 N. J. Eq. 336.

§418. Acknowledgment or proof may be made within the state before the chancellor, or a justice of the supreme court, a master in chancery, a judge of the court of common pleas, or a commissioner of deeds.¹

Without the state and within the United States, before a judge of United States supreme, circuit or district court, chancellor of state or territory where taken, judge of supreme, superior, circuit or district court of the state (all the above without the seal of such officer or court); a mayor or other chief magistrate of a city, under the seal of said city; a master in chancery of New Jersey; a commissioner of deeds for New Jersey, residing where the acknowledgment is taken, under his seal; a judge of the court of common pleas; or before any judge of any court of record, or any officer authorized by the laws of the state or territory where taken to take acknowledgments of deeds of land in and for such state or territory. In the latter cases there must be a double certificate annexed, under the great seal of state, or seal of the court of the county in which the acknowledgment is made, certifying that the officer taking was such officer, duly authorized to take acknowledgment, and that his signature is genuine.

In foreign countries, before any court of law, mayor or other chief magistrate of any city, town or other corporation of such foreign kingdom, nation, state or colony in which the party or witnessès happen to be, certified by such officers in the manner such acts are usually authenticated by them; or any ambassador, public minister, *chargé d'affaires*, consul, vice-consul, or other representative of the United States, for the time being at any foreign court or government; or before a master in chancery of New Jersey. The officer must certify that he is satisfied that the person acknowledging is the person named in and who executed the conveyance, and that he made known to such person the contents of the instrument.²

¹ Rev., *Conveyances*, §§4-5; Marsh v. Mitchell, 26 N. J. Eq. 497; Tooker v. Sloan, 30 N. J. Eq. 394; Pinckney v. Burrage, 31 N. J. L. 21; Crosby v. Fleet, 3 N. J. L. 86; Tiffany v. Glover, 3 Green, G., 387; Sharp v. Hamilton, 12 N. J. L. 108.

² Rev., *Conveyances*, §4, 7-9, 59. The acknowledgment must be made in accordance with the law of New Jersey. *Id.* and *Appendix*, 5.

§419. Acknowledgment of Married Women.

A married woman may own property, real or personal, in her own separate right, but she cannot convey or incumber her real estate without the joinder of her husband. A separate examination of the wife is necessary, and her signature cannot be proved. The form of joint certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

Be it remembered that on this.....day of....., A. D. 18.., before me, the subscriber (name and title of officer), personally appeared.....and....., his wife, who I am satisfied are the grantors named in and who executed the within indenture; and I having first made known to them the contents thereof, they did thereupon severally acknowledge before me that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. And the said....., wife of the....., being by me privately examined, separate and apart from her said husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed freely, without any fear, threats or compulsion of or from her said husband.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

[SEAL.]

(Signature and title.)¹

¹ Rev., *Conveyances*, §9, pp. 638-640; *Wright v. Remington*, 41 N. J. L. 48; s. c. 32 Am. Rep. 180; *Thayer v. Torrey*, 37 N. J. L. 339; *Homeopathic Co. v. Marshall*, 32 N. J. Eq. 103; *Den v. Geiger*, 4 Halst. (9 N. J. L.), 233; *Kearney v. Macomb*, 16 N. J. Eq. 189. A married woman living separate from her husband under final decree of court, may convey interest in lands as if she were unmarried.

§420. Proof by Witnesses.

Witnesses are usual, but not necessary. Conveyance may be proved for record by a subscribing witness, and in such case the certificate, after stating as above the title of

the officer and the appearance of the witness, may proceed thus:

“Who being by me duly sworn according to law, on his oath saith that he saw John Doe, the within named grantor, sign, seal and deliver the within indenture as his voluntary act and deed, and that he, the said....., subscribed his name to the same at the same time as an attesting witness.” The witness should sign the certificate with the jurat of the officer following.¹

The deed of a corporation is proved for record by a subscribing witness. The form of certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

Be it remembered that on the.....day of....., in the year of our Lord, 18.., before me (name and title of officer), personally appeared....., to me known, who being by me duly sworn according to law, on his oath doth depose and say that he is (the secretary or other officer) of (the corporation) the grantors in the foregoing deed named; that the seal affixed to the said deed is the corporate seal of the said (corporation); that it was so affixed by order of the said (corporation); that.....is the (president or other executive officer) of the said (corporation); that he saw the said....., as such....., sign the said deed, and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of the said....., by their order, and that this deponent signed his name thereto at the same time as a subscribing witness.

Subscribed and sworn before me, the day and year above written.

(Signature and title.)²

¹ Rev., *Conveyances*. §§4, 6, 7.

² *Coe v. N. J. Ry. Co.*, 31 N. J. Eq. 105. The deed of a corporation must be executed by an officer with express authority, and should be under this form: “In witness whereof, the said (the corporation). hath caused its corporate seal to be affixed, and its president (or other executive officer), to sign his name to these presents the day and year first above written.”

421. Chattel Mortgages not accompanied by change of possession of the property, are absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless duly acknowledged, as in case of deeds and filed, or a true copy thereof, for record in the county where the mortgagor resides, or if he be a non-resident of the state, then in the county where the property is at the time of the execution of the instrument. An affidavit stating the consideration, and as near as possible the amount due and to grow due, on the mortgage is required. The mortgage remains a lien until it is canceled of record.¹ A claim for mechanic's lien must be filed within one year after the labor is performed, or the materials furnished, in the clerk's office of the county where the building is situate. There is a lien for repairs except as against a *bona fide* purchaser or mortgagee without notice.²

¹ Rev., pp. 708-710, §§36-43; Laws, 1878, p. 130; Laws 1881, p. 226; Laws 1885, ch. 244; DeCoursey v. Collins, 21 N. J. Eq. 357; Marvin v. Norton, 48 N. J. L. 410; s. c. 57 Am. Rep. 566; 7 Atl. Repr. 418; Potts v. N. J. Arms, etc., Co., 17 N. J. Eq. 395; Nat. Bank v. Sprague, 21 N. J. Eq. 530; Lowrey v. Harrison, 2 N. J. L. 51; Kelley v. Boylan, 32 N. J. Eq. 581; Fish v. N. Y. Paper Co., 29 N. J. Eq. 610; Deane v. Hutchinson, 40 N. J. Eq. 83.

As to railroad chattel mortgages, Williamson v. N. J. South. Ry. Co., 29 N. J. Eq. 311.

As to record of conditional sales, Cole v. Berry, 42 N. J. L. 308; Marvin v. Norton, *supra*.

² Rev., p. 668; Clark v. Butler, 32 N. J. Eq. 664. As to record of attachment liens: Leathwhite v. Bennett, 11 Atl. Repr. 29.

NEW MEXICO.

§422. Effect of Record.

Conveyances of real estate are not valid except as to the parties interested until deposited for registry in the office of the clerk of the probate court of the county where the real estate is situated. After registration they give notice of the time of being registered to all persons mentioned therein, and all purchasers and mortgagees are considered as having purchased under such notice.¹ A certified copy of a recorded instrument, where the original is lost or cannot be produced, may be given in evidence without proof of execution. Abstracts of title certified as correct by an abstract company of the territory are *prima facie* evidence like the record.²

¹ Comp. Laws N. Mex., 1884, §§429, 2761-2; Laws 1886-7, pp. 26, 27; Gen. Laws 1880, ch. 41, §§14-16; *Moore v. Davey*, 1 N. Mex. 303; *Armijo v. Armijo*, 13 Pac. Repr. 92.

² Comp. Laws, §§2763, 2744. A revocation of a recorded power of attorney must also be registered. §2766. Seals are required, but a scroll will answer for a seal. Mortgages are recorded the same as deeds, but in separate books, there being no other separate statutory provisions in this respect. The probate clerk is subject to a fine of \$100 for failure to enter the instrument of record immediately on its receipt.

§423. **Acknowledgment** may be made within the territory before any judge, justice of the peace, notary public having a seal, or a clerk of a court having a seal.

Without the territory and within the United States, before any court of the United States, or any state or territory having a seal, or the clerk thereof, the genuine signature and official character of such judge being certified to under seal of his court by the clerk thereof, or before a commissioner of deeds for New Mexico.

In foreign countries before any court of any state, kingdom or empire having a seal, or judge of any court of record, magistrate or supreme power of any city, notary public, consul or vice-consul of the United States, each of said officers to have a seal. All persons taking foreign acknowl-

edgment must have their identity certified in the usual manner for establishing the identity of a foreign official.¹

¹ Comp. Laws, §§2740-2754. When the officer does not personally know the person acknowledging, the identity may be established by at least two reliable witnesses, which fact the certificate must show. §2754. Where corporations have no corporate seal, the words, "and that said corporation (or association) has no corporate seal" should appear. Laws 1888-9, p. 98.

§424. Acknowledgment of Married Women.

No separate examination of a married woman is required. The form of joint certificate may be as follows:

TERRITORY OF NEW MEXICO, }
COUNTY OF..... }

On this.....day of....., 18....., before me personally appeared A. B., and C. D., his wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[SEAL.] *

(Signature and title.)¹

In the case of natural persons acting by attorney:

TERRITORY OF NEW MEXICO, }
COUNTY OF..... }

On this.....day of....., 18....., before me personally appeared A. B., to me known to be the person who executed the foregoing instrument in behalf of C. D., and acknowledged that he executed the same as the free act and deed of said C. D.

[SEAL.]

(Signature and title.)

Comp. Laws, §2759. The wife owns separate property in her own right, but husband and wife should join in conveyances of real estate. §§1087, 2756. The Act of Feb. 27, 1887, allows the surviving wife one-third of all the real estate owned by the husband at any time, in the conveyance of which she has not joined. When the wife unites with her husband in an acknowledgment, she shall be described as his wife; in all other respects her acknowledgment shall be taken and certified as if she were sole. No separate examination of a married woman in respect to the execution of any release of dower, or other instrument affecting real estate, shall be required. She may acknowledge any conveyance through an attorney, authorized in writing by a power of attorney by herself and husband. Laws 1888-9, p. 99.

§425. Witnesses.

The execution of a deed cannot be proved by witnesses, except as between original parties, and not then, in case of married women.¹

Comp. Laws, §§1088, 2756-2759.

§426. Chattel Mortgages.

Hereafter all chattel mortgages, or other instruments of writing having the effect of a mortgage or lien upon personal property, shall be acknowledged by the owner or mortgagor, and recorded in the same manner as conveyances affecting real estate. When recorded the party in whose favor the mortgage is executed may withdraw the same. The record is not good for longer than one year, unless within thirty days next preceding the end of the year an affidavit of renewal is filed, exhibiting the then interest of the mortgagee in the property.¹

¹ Comp. Laws, §§1589-1591, 1593; Laws 1888-9, pp. 162-3. Gen. Laws 1880, pp. 63-65; *Redewell v. Gillen*, 12 Pac. Repr. 872. All personal property, except growing crops, is subject to mortgage. A copy of the mortgage, and statutory affidavit thereto annexed, if any, certified by the recorder, in whose office the same shall be filed, shall be received as evidence that the same was received and filed according to the indorsement of the recorder thereon. In the absence of stipulations to the contrary, the mortgagor has the right to the possession of the property. §1593.

§427. Effect of Record.

Deeds are conclusive as against subsequent purchasers from the grantor, or from his heirs claiming as such, except against subsequent purchasers in good faith and for a valuable consideration, who shall acquire a superior title by a conveyance that shall have been first duly recorded.¹ Conveyances of realty must be recorded in the clerk's office of the county where the land is situated, except in the counties of New York, Westchester and Kings, where a register of deeds exists as a separate officer.² Conveyances in fee, or of freehold estates, must be subscribed and sealed, a scroll being insufficient; and if not duly acknowledged previous to delivery, their execution and delivery must be attested by at least one witness; if not so acknowledged or attested, they do not take effect as against a purchaser or incumbrancer until so acknowledged.³ A recorded deed may be read in evidence without proof of its execution; the copy of any record, of any recorded deed or instrument, attested and authenticated in such manner as would by law entitle it to be read in evidence, may be again recorded in any office wherein the original would be entitled to be recorded, and such record shall have the same effect as if the original were so recorded. The term "conveyance" embraces every instrument in writing by which any estate, or interest in real estate, is created, aliened, mortgaged or assigned; or by which the title to any real estate may be affected in law or equity; except last wills and testaments, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands. A revocation of a power of attorney must also be recorded in the same office with the letter.⁴

¹ Bank's Rev. Stats. (1889), pt. 2, ch. 3, §1; Rev. Stats., 1875, vol. 2, p. 1138, §1; p. 1119, §155; Fay's Dig. of Laws, 1876, vol. 1, p. 580; Laws 1882, ch. 410. As to effect of recording, see *McPherson v. Rollins*, 107 N. Y. 317; s. c. 1 Am. St. Rep. 826; 14 N. E. Repr. 411; *Purley v. Huntington*, 42 N. Y. 343; s. c. 1 Am. St. Rep. 532; *Acer v. Westcott*, 46 N. Y. 384; s. c. 7 Am. Rep. 355; *Herrington v. Erie Co. Bank*, 101 N. Y. 257; *Brewster v. Carnes*, 103 N. Y. 556; s. c. 9 N. E. Repr. 323;

Stuyvesant v. Hone, 1 Sand. Ch. 419; s. c. 2 Barb. Ch. 151; Parker v. Conner, 93 N. Y. 118; s. c. 45 Am. Rep. 184; Jumel v. Jumel, 7 Paige, 591; People v. Chapin, 104 N. Y. 96; s. c. 10 N. E. Repr. 141; Gibert v. Peteler, 38 N. Y. 165; s. c. 38 Barb. 488; 97 Am. Dec. 785; Crane v. Turner, 67 N. Y. 437; s. c. 7 Hun. 357; Dunham v. Dey, 15 Johns. 555; s. c. 8 Am. Dec. 282; Cambridge Bank v. Delano, 48 N. Y. 326; N. Y. Life Ins. Co. v. Covert, 6 Abb. N. S. 154; Wagner v. Hodge, 34 Hun. (41 Sup. Ct.) 524; Stearns v. Gage, 79 N. Y. 102; White v. Carpenter, 2 Paige, 217; Raynor v. Wilson, 6 Hill, 469; Lemon v. Staats, 1 Cow. 592; M rray v. Ballou, 1 Johns. Ch. 566; Baker v. Bliss, 39 N. Y. 70; Webster v. Van Steenburg, 46 Barb. 211.

Actual notice is effectual. Howard v. Halsey, 8 N. Y. 271; s. c. 59 Am. Dec. 478; 4 Sand. 565; Burnham v. Brenham, 42 N. Y. Sup. Ct. 51; Zimmermann v. Kinkle, 108 N. Y. 282; s. c. 15 N. E. Repr. 407; Tuttle v. Jackson, 6 Wend. 213; s. c. 21 Am. Dec. 306; except as to deeds of freehold estates neither acknowledged nor attested by two witnesses. Rev. Stats., p. 738, §137; Chamberlain v. Spargur, 86 N. Y. 603; Nellis v. Munson, 108 N. Y. 453; s. c. 15 N. E. Repr. 739.

² Bank's Rev. Stats. (1889), pt. 2, ch. 3, §1; 1 Rev. Stats., 756. Possession is notice. Grimstone v. Carter, 3 Paige, 421; s. c. 24 Am. Dec. 230; Seymour v. McKinstrey, 106 N. Y. 230; s. c. 12 N. E. Repr. 348; 8 Cent. Repr. 72; Thompson v. Burnhaus, 79 N. Y. 100; Jackson v. Warford, 7 Wend. 62; Cahill v. Palmer, 45 N. Y. 484; Brown v. Volkenning, 64 N. Y. 76; Stewart v. Long Island Ry. Co., 102 N. Y. 601; s. c. 4 Cent. Repr. 115; 8 N. E. Repr. 200.

As to definition of deed, and as to record of executory contracts and equitable title, see Bank's Rev. Stats., pt. 2, ch. 3, §38; and Laverty v. Moore, 33 N. Y. 658; s. c. 32 Barb. 347; Tarbell v. West, 86 N. Y. 280; Ludlow v. Van Ness, 8 Bosw. 178; Crane v. Turner, 67 N. Y. 437; s. c. 7 Hun. 357; *ante*, §179.

As to record of sheriff's certificates of sale, see Vaughn v. Ely, 4 Barb. 186; Everston v. Sawyer, 2 Wend. 507; Reynolds v. Darling, 42 Barb. 418.

As to rights of creditors under the recording acts, Schroeder v. Gurney, 73 N. Y. 430; Southard v. Benner, 72 N. Y. 427; Rogers v. Benner, 45 N. Y. 379; Fraser v. Gilbert, 11 Hun. 634; Joslin v. Cowee, 60 Barb. 48; Button v. Rathbone, 43 Hun. 137; Browell v. Curtis, 10 Paige, 217; Barton v. Hosner, 24 Hun. 468; Wood v. Chapin, 13 N. Y. 509; s. c. 67 Am. Dec. 62; Jackson v. Chamberlain, 8 Wend. 625; Wright v. Douglass, 10 Barb. 97; Jackson v. Dubois, 4 Johns. 216; Sieman v. Schurck, 29 N. Y. 568.

³ 1 Rev. Stats., 738, §137; Bank's Stats. (1889), pt. 2, ch. 1, tit. 2, §137; Nellis v. Munson, 108 N. Y. 453; s. c. 15 N. E. Repr. 739; Chamberlain v. Spargur, 86 N. Y. 603.

As to *bona fide* purchasers and valuable consideration, see Hendry v. Smith, 49 Hun. (56 Sup. Ct.) 510; Van Rensselaer v. Clark, 17 Wend. 25; Frost v. Beekman, 1 Johns. Ch. 288; Van Heuzen v. Radcliff, 17 N. Y. 580; s. c. 72 Am. Dec. 480; Jackson v. Burgott, 10 Johns. 457; s. c. 6 Am. Dec. 349; Wright v. Douglass, 10 Barb. 107; Hooker v. Pierce, 2 Hill, 650; Farmer's Loan Co. v. Maltby, 8 Paige, 361; Rockwell v. McGovern, 69 N. Y. 294; Williams v. Shelby, 37 N. Y. 375; Union Institute

v. Duryea, 67 N. Y. 84; Reed v. Gorman, 3 Daly, 414; Penfield v. Dunbar, 64 Barb. 239; Dickerson v. Tillinghast, 4 Paige, 215; s. c. 25 Am. Dec. 528; Weaver v. Barden, 49 N. Y. 286; Coddington v. Bay, 20 Johns. 639; s. c. 11 Am. Dec. 342; Tiffany v. Warren, 37 Barb. 571.

⁴ Bank's Stats. (1889), pt. 2, ch. 3, §§38, 40; 1 Rev. Stats., pp. 762, 763; Laws 1887, c. 539; Fay's Dig., vol. 1, p. 586, §50; Code Civ. Proc. §§935, 936, 946, 947; Hunt v. Thompson, 19 N. Y. 279; Jackson v. Shephard, 2 Johns. 76.

As to *lis pendens* notices: Lamont v. Cheshire, 65 N. Y. 30; Brooks v. Davey, 109 N. Y. 495; s. c. 17 N. E. Repr. 412; Leitch v. Wells, 48 N. Y. 585; Hayden v. Bucklin, 9 Paige, 572.

§428. Mortgages of Realty.

Separate books are kept in which all mortgages and all conveyances absolute in terms, but intended as mortgages, are recorded. Every deed which appears by any other writing to have been intended only as a security in the nature of a mortgage, though absolute in terms, is considered a mortgage; and a person for whose benefit the deed is made can derive no advantage from the record of it, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith and at the same time.¹ Mortgages are discharged of record by a certificate of discharge, signed by the mortgagee, his personal representatives or assigns, duly acknowledged or proved and witnessed and recorded, together with a minute thereof made by the recorder on the record of the mortgage.²

¹ 2 Rev. Stats., p. 1138; Bank's Stats. (1889), pt. 2, ch. 3, §§2, 3; Fay's Dig., vol. 1, p. 580; Purdy v. Huntington, 42 N. Y. 343; s. c. 1 Am. St. Rep. 532; Decker v. Boice, 19 Hun, 152; s. c. 83 N. Y. 215; Dusenbury v. Hurlburt, 59 N. Y. 541; Thomas v. Kelsey, 30 Barb. 268; Rice v. Dewey, 54 Barb. 455; Greene v. Warnick, 64 N. Y. 220; Young v. Guy, 87 N. Y. 457; Guion v. Knapp, 6 Paige, 35; s. c. 29 Am. Dec. 741; Elliott v. Wood, 53 Barb. 285; s. c. 45 N. Y. 71; James v. Morey, 2 Cow. 246; s. c. 14 Am. Dec. 475; Jones v. Phelps, 2 Barb. Ch. 410; Berry v. Mut. Ins. Co., 2 Johns. Ch. 612; Brewster v. Carnes, 103 N. Y. 556; Jackson v. Center, 19 Johns. 281; Corning v. Murray, 3 Barb. 652; Jackson v. Austin, 15 Johns. 477; Lemon v. Staats, 1 Cow. 592; Westbrook v. Gleason, 79 N. Y. 23; Stafford v. Van Rensselaer, 9 Cow. 316; Freeman v. Schroeder, 43 Barb. 618; Brinckerhoff v. Lansing, 4 Johns. Ch.

65; *Youngs v. Wilson*, 27 N. Y. 351; *Dimon v. Dunn*, 15 N. Y. 498; *Genesee Natl. Bank v. Whitney*, 103 U. S. 99.

² 2 Rev. Stats., p. 1149; *Bank's Stats.*, pt. 2, ch. 3, §§28, 29; *Fay's Dig.*, pp. 584, 592; 1 Rev. Stats., p. 761, §§28, 29; *Laws 1862*, ch. 365; *Laws 1884*, ch. 326; *McPherson v. Rollins*, 107 N. Y. 317; s. c. 14 N. E. Repr. 411; *Re Townsend*, 4 Hun. 31; N. Y. Life Ins. Co. v. *Smith*, 2 Barb. Ch. 82; *Ely v. Schofield*, 35 Barb. 330; *Weber v. Bridgman*, 13 N. Y. 600; s. c. 21 N. E. Repr. 984; *Swarthout v. Curtis*, 5 N. Y. 301; s. c. 55 Am. Dec. 345; *McGovern v. Wheelock*, 7 Barb. 22; *Van Keurens v. Corkins*, 66 N. Y. 77; N. Y. Life Ins. Co. v. *Covert*, 6 Abb. N. S. 154.

As to assignment of mortgages, see *DeLancy v. Stearns*, 66 N. Y. 157; *St. Johns v. Spaulding*, 1 Thomp. & C. 483; *Westbrook v. Gleason*, 79 N. Y. 23; *Smith v. Knickerbocker*, 84 N. Y. 589; *Jackson v. Richards*, 6 Cow. 617; *Corning v. Murray*, 3 Barb. Ch. 652.

A deed absolute in terms, but really intended as a mortgage, must be recorded in the book of mortgages. *Brown v. Dean*, 3 Wend. 213, and other cases cited *ante*, §138.

As to process for the discharge on the record of mortgages presumed from lapse of time to have been paid, or where the mortgagee is dead, or absent from the state, or a corporation since dissolved, see *Laws 1862*, ch. 365, §§1-5.

So far as notice is concerned, a conveyance is considered as recorded from the time it is filed for record. *Bank's Stats.*, pt. 2, ch. 3, §24; *Bradford v. Tupper*, 30 Hun. 174.

§429. Acknowledgment or proof for record within this state may be made before the justices and judges of courts of record, judges of county courts, mayors and recorders of cities, notaries public, or commissioner of deeds; said officers acting within their respective local jurisdictions.¹

Without the state and within the United States, before the chief or associate justices of the supreme court of the United States, district judges of the United States, the judges or justices of the supreme, superior or circuit court of any state or territory, and the chief judge, or any associate judge, of the circuit court of the United States in the District of Columbia; before the mayor of any city, or before any officer of any state or territory authorized by the laws thereof to take proof and acknowledgment of deeds, such acknowledgment to be according to laws of such state, and certified to by the clerk of a court of record.² To entitle the conveyance to be recorded, the acknowledgment must be taken within the jurisdiction of the officer.³

In foreign countries—in Europe, North or South America—before any minister or *chargé d'affaires* of the United States resident and accredited within such state or kingdom. In France, before the United States consul appointed to reside at Paris. In Russia, before the United States consul appointed to reside at St. Petersburg. In the United Kingdom of Great Britain and Ireland, or the dominions thereunto belonging, before the mayor, or provost, or chief magistrate of any city or town, or any consul of the United States, appointed to reside at any place in said kingdom or dominions, or before any consul of the United States, or a judge of the highest court in Upper or Lower Canada. Such proof or acknowledgment, duly certified under the hand and seal of the above officers, shall have like force and validity as if taken before a justice of the supreme court of this state. Proofs, etc., taken by a special commissioner, authorized for that purpose, under the seal of the court of chancery of this state, to be issued to any reputable person residing in or going to such country, shall be valid.⁴

The officer must know the grantor or witness personally, or have satisfactory proof of his identity.⁵ A separate examination of the wife and certificate thereof is not now required.⁶ The form of joint certificate may be as follows:

STATE OF..... }
COUNTY OF..... } .

On this.....day of....., 18..., before me (name and title of officer) personally came A. B., and C. B., his wife, to me personally known (or proven to me satisfactorily) to be the individuals described in, and who executed the within (or annexed) conveyance, and severally duly acknowledged that they executed the same for the purposes therein mentioned.

[SEAL.]

(Signature and title.)⁷

The certificate of authentication, where the acknowledgment or proof is taken according to the laws of another state, may be as follows:

STATE OF..... }
 COUNTY OF..... }

I, C. D., clerk (recorder, register or prothonotary) of said county (or of.....court of said county), do hereby certify that A. B., who subscribed the foregoing certificate of acknowledgment (or proof), was at the time of taking such acknowledgment (or proof) a notary public (or other officer), residing in said county, and duly authorized to take and certify the same by the laws of said state, and that the same is taken and certified in all respects as required by the laws of said state; that I am well acquainted with the handwriting of said A. B., and verily believe that the signature attached to the foregoing certificate is the genuine signature of said A. B.

Witness my hand and official seal, this.....day of
, 18....

[OFFICIAL SEAL.]

(C. D., Clerk, etc.)

Bank's Stats. (1889), pt. 2, ch. 3, §4; 1 Rev. Stats., p. 756, §4; Laws 1863, 880, ch. 508. Resident commissioners of deeds are now appointed for cities only, and by the common councils thereof. Laws 1848, ch. 75; Laws, 1840, ch. 238; Laws 1880, ch. 544; 3 Rev. Stats., pp. 282, 283, §41. Their jurisdiction is confined to the cities for which they are respectively appointed. Bank's Stats., pt. 2, ch. 3, §18. Laws 1876, ch. 58; Laws 1880, ch. 115; Davis v. Rich, 2 How. Pr. 181; Sandland v. Adams, 2 How. Pr. 127.

A notary public must reside in his county or city, but can exercise the duties of his office anywhere in the state: 1 Rev. Stats., p. 102; §14; or at least in any adjoining county, by filing a copy of his appointment in such other county for which he may act. Bank's Stats., pt. 3, ch. 3; Laws 1884, ch. 270; Laws 1883, ch. 140; Produce Bank v. Baldwin, 49 How. Pr. 277. The presumption that the notary has duly filed such copy is not conclusive, and without such filing in the county of the venue, his action is a nullity. Estate of King, Civ. Proc. Reports, McCarthy, vol. 2, p. 71; and see Lane v. Morse, 6 How. 349; Cook v. Staats, 18 Barb. 407; Lambert v. People, 6 Abb. N. C. 181. Relationship does not disqualify the officer: Lynch v. Livingston, 6 N. Y. 422; but interest disqualifies: Taylor v. Hatch, 12 Johns. 340; People v. Spaulding, 2 Paige, 327; Post v. Coleman, 9 How. Pr. 64.

A notary cannot delegate his official authority to a clerk. Sheldon v. Benham, 4 Hill, 129; s. c. 40 Am. Dec. 271; Sacridier v. Brown, 3 McLean, 483. Where the instrument is to be used in New York a notary need not necessarily use his seal. Laws 1859, ch. 360.

The certificate of acknowledgment of a notary or resident commissioner of deeds will not entitle a conveyance to be recorded or read in

evidence in any county other than that wherein it is executed, unless accompanied by the certificate of the county clerk, to the effect that such officer was duly authorized, and his signature to the certificate genuine. 2 Rev. Stats., p. 759, §18; Laws 1883, ch. 140; Laws 1884, ch. 270; Bank's Stats., pt. 2, ch. 3, §18.

² Laws 1845, ch. 109; Laws 1846, ch. 195, as amended by Laws 1856, ch. 61; Laws 1867, ch. 557.

³ Bank's Stats., pt. 2, ch. 3, §4; 1 Rev. Stats., 757, §4; Laws 1845, ch. 100; Laws 1875, ch. 136, §2; Laws 1876, ch. 58; Laws 1850, ch. 270. The certificate of acknowledgment by a commissioner of deeds for New York in another state must specify the date thereof, and the county, town or city where taken. Bank's Stats., pt. 2, p. 2480; Laws 1850, ch. 270, as amended by Laws 1880, ch. 115.

In cases where the double certificate is required, the record is ineffectual without it. *Strong v. Smith*, 3 McLean, 362; and cases cited *ante*, §75.

⁴ Bank's Stats., pt. 2, ch. 3, §§5, 6; 1 Rev. Stats., 757, §8; 759, §6; Laws 1888, ch. 246; Laws 1870, ch. 208; Laws 1865, ch. 421. A certificate made by a judge in Canada must be accompanied by the certificate of the clerk of his court under seal, certifying his official character, signature, etc. Laws 1870, ch. 208.

⁵ 2 Rev. Stats., p. 758, §§9, 12; Bank's Stats., pt. 2, ch. 3, §9; 1 Rev. Stats. 758, §11; *Jones v. Bach*, 48 Barb. 568; *Dennis v. Tarpenny*, 20 Barb. 371; *Treadwell v. Sackett*, 50 Barb. 440; *Fryer v. Rockafellow*, 63 N. Y. 268; *ante*, §§76, 77.

⁶ Laws 1880, ch. 300; *Cashman v. Henry*, 75 N. Y. 103. Bank's Stats., pt. 2, p. 2487. The wife is authorized by statute to convey by power of attorney. Bank's Stats., pt. 2, p. 2426. Laws 1878, ch. 300.

⁷ Without due acknowledgment the record is ineffectual. *Rennie v. Bean*, 24 Hun, 123; *Heilbrun v. Hammond*, 13 Hun, 474; *Smith v. Boyd*, 10 Daly, 149; Bank's Stats., pt. 2, ch. 3, §§4, 15, 16.

Proof for record of a conveyance by a corporation should show that the proper corporation officer made oath to his name and place of residence; the title of his corporate office; the name of the corporation; that he knows the corporate seal; that such seal was affixed to the instrument, and so affixed by order of the board of directors, or trustees, or other proper authority, and that he signed his name thereto by like order; and if the instrument is signed by another corporate officer, that such other signature is genuine, and was made by like order of the board in affiant's presence; and that the person making it was such corporate officer as he therein purports to be. *Lovett v. The Steam Saw Mill Co.*, 6 Paige, 54, 60; *Johnson v. Bush*, 3 Barb. Ch. 207.

§430. Proof by Witnesses.

Proof for record may be made by a subscribing witness. The form of certificate, where the witness is known to the officer, may be as follows

STATE OF..... }
COUNTY OF..... }

On this....day of....., 18..., before me (name and title of officer) personally came C. D., subscribing witness

to the within (or annexed) conveyance (or instrument), with whom I am personally acquainted, who being by me duly sworn, said that he resided in the city of....., that he was acquainted with A. B., and knew him to be the person described in and who executed the said conveyance (or instrument), and that he saw him execute (and deliver) the same, and that he acknowledged to him, the said C. D., that he executed (and delivered) the same, and that he, the said C. D., thereupon subscribed his name as a witness thereto.

[SEAL.]

(Signature and title.)¹

Conveyances may also be authenticated for record by proof of handwriting, when all of the witnesses thereto are dead, and in such case the original instrument must be deposited with the recorder.²

¹ Bank's Rev. Stats. (1889), pt. 2, ch. 3, §§30, 31; *Jackson v. Livingston*, 6 Johns. 149; *Norman v. Wells*, 17 Wend. 137; *Jackson v. Osborne*, 2 *Id.* 558; s. c. 20 Am. Dec. 649; *Jackson v. Gould*, 7 Wend. 366; *Parker v. Phillips*, 9 Cow. 94; *Sheldon v. Stryker*, 42 Barb. 284; *Borst v. Empie*, 5 N. Y. 33; *ante*, §128; *Dennis v. Tarpenny*, 20 Barb. 371.

² Bank's Stats., pt. 2, ch. 3, §32. As to the venue and jurat of affidavits, see *Lane v. Morse*, 6 How. 394; *Cook v. Staats*, 18 Barb. 407; *City Bank v. Lumley*, 28 How. 397; *Barnard v. Darling*, 1 Barb. Ch. 218; *Haynes v. Powell*, 3 Dowl. Prac. Ca. 599.

§431. Chattel Mortgages not accompanied by an immediate delivery followed by an actual and continued change of possession of the property, are absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless filed, or a true copy thereof, in the several towns and cities where the mortgagor, if a resident of this state, shall reside at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument. The record ceases to be valid after one year, unless within thirty days' next preceding the end of the year, a true copy of the mortgage, together with a statement exhibiting the interest claimed by the mortgagee in the property, be duly

filed.¹ Chattel mortgages may be discharged of record by filing a certificate executed by the mortgagee, or the holder and owner thereof, that the mortgage is paid or satisfied when the recorder or clerk shall write the word "discharged" in the record book, opposite the entry of such mortgage.² Conditional sales of personal property are required to be recorded as chattel mortgages.³

¹ Bank's Stats. (1889), pt. 2, p. 2508; Rev. Stats., pp. 143-145, §§9-14; Laws 1879, ch. 418; ch. 233, §2; Conklin v. Shelly, 28 N. Y. 360; s. c. 84 Am. Dec. 348; Stewart v. Beale, 68 N. Y. 405; s. c. 7 Hun, 405; Jones v. Graham, 77 N. Y. 628; Tiffany v. Warren, 37 Barb. 571; Powers v. Freeman, 2 Lans. 127; Wray v. Fedderke, 43 N. Y. Sup. Ct. 335. As to re-filing, see Stewart v. Cole, 43 Hun, 164; Patterson v. Gillies, 64 Barb. 563; Laws 1833, ch. 279; Laws 1873, ch. 501.

As to personal property, see *Saltus v. Everett*, 20 Wend. 267; s. c. 32 Am. Dec. 541; *Crocker v. Crocker*, 31 N. Y. 507; *Reed v. Gannon*, 50 New York, 345; *Wooster v. Sherwood*, 25 N. Y. 278; *Thompson v. Van Vetchen*, 27 N. Y. 568; *Martin v. Rothschild*, 42 Hun, 410; *Parker v. Connor*, 93 N. Y. 118; s. c. 45 Am. Rep. 178; *Barnard v. Campbell*, 58 N. Y. 73; s. c. 17 Am. Rep. 208; *Sprights v. Hawley*, 39 N. Y. 141; s. c. 100 Am. Dec. 452; *Dows v. Kidder*, 84 N. Y. 121; *Rawles v. Deshler*, 3 Keys, 572; *Bean v. Edge*, 84 N. Y. 510; *Comer v. Cunningham*, 77 N. Y. 398.

² Bank's Stats., pt. 2, p. 2511; Laws 1879, ch. 171. See further as to record of chattel mortgages, *Teft v. Horton*, 53 N. Y. 177; *Van Heuzen v. Radcliff*, 17 N. Y. 580; s. c. 72 Am. Dec. 483; *Wood v. Lowry*, 17 Wend. 492; *Benedict v. Smith*, 10 Paige, 126; *Crandall v. Brown*, 18 Hun. 461; *Hayman v. Jones*, 7 Hun, 238; *Butler v. Rathbone*, 43 Hun. 137; *Porter v. Parmely*, 52 N. Y. 185; s. c. 34 N. Y. Sup. Ct. 398; *Newell v. Warner*, 44 Barb. 258; *Hathaway v. Howell*, 54 N. Y. 97; *Nixon v. Stanley*, 33 Hun, 247; *Otis v. Sill*, 8 Barb. 102; *Ely v. Carnley*, 3 E. D. Smith, 489; s. c. 19 N. Y. 493; *Dillingham v. Bolt*, 37 N. Y. 198; s. c. 4 Abb. Pr. N. S. 221.

³ Bank's Stats., pt. 2, p. 2522; Laws 1884, ch. 315, §§1, 2; *Preston v. Southwick*, 42 Hun, 291. For cases prior to the statute, see *Smith v. Lynes*, 5 N. Y. 41; *Puffer v. Reeves*, 35 Hun, 480, and cases cited *ante*, §250.

Mechanics' liens must be filed within ninety days from completion of the work, and the lien continues for only one year, unless an action or other proceeding to enforce it is commenced. Bank's Stats., pt. 3, p. 2695; Laws 1885, ch. 342; *Spencer v. Barnet*, 35 N. Y. 96; Laws 1878, p. 379.

NORTH CAROLINA.

§432. . Effect of Record.

No conveyance of land, nor contract to convey, or lease of land for more than three years, shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth. They shall before registration be acknowledged by the grantor, lessor or the person executing the same, or proven on oath by one or more witnesses, as prescribed by law, and all deeds so executed and registered shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony whatever.¹ Powers of attorney are to be recorded in the county where the land lies. Certified copies from the record may be recorded and may be given in evidence without the production of the original, unless the court by order requires such production.²

¹ Laws 1885, ch. 147, §§1, 3; Battle's Revisal, 1873, ch. 35, §§1, 6; *Branch v. Griffin*, 99 N. C. 173; s. c. 5 S. E. Repr. 393; *Weathersbee v. Farrar*, 90 N. C. 106; *Woodfolk v. Blount*, 3 Hayw. 147; s. c. 9 Am. Dec. 739; *King v. Portis*, 77 N. C. 25; *Cowles v. Hardin*, 91 N. C. 231; *Worthy v. Caddy*, 76 N. C. 82; *Hogan v. Strayhorn*, 65 N. C. 275; *Goldsborough v. Turner*, 67 N. C. 403; *Pearson v. Powell*, 100 N. C. 86. Unregistered deeds, executed prior to 1855, may have the same recorded without proof of execution. Laws 1885, ch. 147, §2.

As to record within and after the statutory time: *Phifer v. Barnhart*, 88 N. C. 333; *Sellers v. Sellers*, 98 N. C. 13; *Clark v. Arnold*, 2 Hayw. 287. Record of bond for title effectual. *Derr v. Dellinger*, 75 N. C. 300.

As to filing for record: *Metts v. Bright*, 4 Dev. & Bat. 173; s. c. 32 Am. Dec. 683; record of attached schedule, *McKinnon v. McLean*, 2 Dev. & Bat. 79; recording fees, *Ridley v. McGee*, 2 Dev. 40.

Without record a deed does not convey the legal title. *Triplett v. Witherspoon*, 74 N. C. 475; *Hare v. Jernigan*, 76 N. C. 471; *Hodges v. Spicer*, 79 N. C. 223; *Fortune v. Watkins*, 94 N. C. 304; *Austin v. King*, 91 N. C. 280; *Davis v. Inscoe*, 84 N. C. 396.

² Code 1883, §§1249, 1251, 1253, 1264; Battle's Rev., p. 352; *Benzein v. Lenoir*, 1 Mur. 194. Actual notice of equitable title effectual. *Durant v. Crowell*, 97 N. C. 367; *Phifer v. Barnhart*, 88 N. C. 333; *Hodges v. Spicer*, *supra*; *Bunting v. Ricks*, 2 Dev. & Bat. Eq. 130; *Derr v. Dellinger*, *supra*.

Possession is notice. *Edwards v. Thompson*, 71 N. C. 177; *Mayo v. Leggett*, 96 N. C. 237; s. c. 1 S. E. Repr. 622; *Staton v. Davenport*, 95 N. C. 4; *Tankard v. Tankard*, 79 N. C. 54; *Moore v. Thompson*, 69 N. C. 121; *Scott v. Elkins*, 83 N. C. 421; *Streator v. Jones*, 3 Hawks. 423;

Kemp v. Earp, 7 Ired. Eq. 167; Green v. Harmon, 4 Dev. L. 158; Taylor v. Kelley, 3 Jones Eq. 240; Simpson v. Blount, 3 Dev. L. 34; Bartlett v. Simmons, 4 Jones L. 295; Thomas v. Kelley, 13 Ired. L. 43.

Corporations may convey by deed, sealed with the common seal, and signed by the president or presiding member or trustee, and two other members, and attested by witnesses. Code, §685; or as at common law, Bason v. Mining Co., 90 N. C. 417.

§433. Mortgages, Real and Chattel.

No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth, or in case of personal estate, where the donor, bargainor or mortgagor resides, or in case he shall reside out of the state, then in the county where the said personal estate, or some part thereof, is situate, or in case of choses in action, where the donor, bargainor or mortgagor resides.¹ Mortgages and trust deeds are discharged of record by an entry in the margin thereof, signed by the person making the discharge, and witnessed by the register.² Trust deeds of personal property are declared to be good to all intents and purposes when the same shall be duly registered according to law.³ The statute requires the registry of conditional sales of personal property.⁴ There is no provision for the renewal or re-filing of these sales, or of chattel mortgages.

¹ Code (1883), §1254; Battle's Rev., ch. 35, §12; Smith v. Bynum, 92 N. C. 108; Trader's Bank v. Woodlawn, 100 N. C. 345; s. c. 5 S. E. Repr. 81; Howell v. Howell, 7 Ired. 491; Weathersbee v. Farrar, 90 N. C. 106.

The record of a deed not notice of a mortgage. Gully v. May, 84 N. C. 434; Gregory v. Perkins, 4 Dev. 50; Holcombe v. Ray, 1 Ired. L. 340; Dakes v. Jones, 6 Jones, 14.

Actual notice of an unrecorded mortgage is ineffectual. Hinton v. Leigh, 102 N. Car. 28; Bank v. Manufacturing Co., 96 N. C. 298; s. c. 3 S. E. Repr. 363; Fleming v. Burgin, 2 Ired. Eq. 584; Todd v. Outlaw, 79 N. C. 235; Robinson v. Willoughby, 70 N. C. 358; Deal v. Palmer, 72 N. C. 582.

² Code, §1271; Walker v. Mebane, 90 N. C. 259. Purchase money mortgages: Moring v. Dickerson, 85 N. C. 466; Bunting v. Jones, 78 N. C. 242. Wife need not join: Code, §1272.

As to creditors and purchasers under the recording acts: *King v. Portis*, 77 N. C. 25; *Davy v. Littlejohn*, 2 Ired. Eq. 695; *Goldsbrough v. Turner*, 67 N. C. 403; *Carroll v. Johnston*, 2 Jones Eq. 120; *Harris v. Horner*, 1 Dev. & Bat. 445; s. C. 30 Am. Dec. 182; *Polk v. Gallant*, 2 Dev. & Bat. Eq. 395; s. C. 34 Am. Dec. 395; *Walker v. Moody*, 65 N. C. 599.

³ Code, §1274; *Etheridge v. Hilliard*, 100 N. C. 250; *Sharpe v. Pearce*, 74 N. C. 600; *Gaither v. Mumford*, Taylor's Term, 167; *Simpson v. Morris*, 3 Jones, 411; *Harris v. Jones*, 83 N. C. 317.

As to description of mortgaged chattels: *Weaver v. Chunn*, 99 N. C. 431; s. C. 6 S. E. Repr. 370; *Harris v. Woodward*, 96 N. C. 232; *Goff v. Pope*, 83 N. C. 127; *Spivey v. Grant*, 96 N. C. 214; s. C. 2 S. E. Repr. 45.

⁴ Code, §1275; *Empire Drill Co. v. Allison*, 94 N. C. 548; *Chemical Co. v. Johnson*, 98 N. C. 123; s. C. 3 S. E. Repr. 723.

As to *lis pendens* notices, see *Badger v. Daniel*, 77 N. C. 251; *Rollins v. Henry*, 78 N. C. 342; *Todd v. Outlaw*, 79 N. C. 235.

The form prescribed by statute for a chattel mortgage not exceeding three hundred dollars is as follows:

I, ..., of the county of....., in the State of North Carolina. am indebted to....., of.....county, in said state, in the sum of dollars, for which he holds my note, to be due the.....day of....., A. D. 18..., and to secure the payment of the same, I do hereby convey to him these articles of personal property, to-wit (insert description): but on this special trust, that if I fail to pay said debt and interest on or before the.....day of....., A. D. 18..., then he may sell said property, or so much thereof as may be necessary, by public auction, for cash, first giving twenty days' notice at three public places, and apply the proceeds of such sale to the discharge of said debt, and interest on the same, and pay any surplus to me.

Given under my hand and seal, this.....day of.....A. D. 18...
(Signature and seal.)

§434. Acknowledgment or proof may be made within the state before judges of the supreme or superior courts, clerks of the superior and inferior courts, justices of the peace and notaries public.¹

Without the state and within the United States, before a commissioner of deeds for North Carolina, or a commissioner specially appointed by a court of North Carolina; judge or clerk of a court of record, notary public or mayor, under seal, or justice of the peace. The official character and genuine signature of a justice of the peace must be certified by the clerk of a court of record of his county under seal.²

In foreign countries, before the chief magistrate of any city, ambassador, minister, consul or commercial agent of the United States. All instruments requiring registration must be offered for probate, or a certified copy thereof must be exhibited, to the clerk of the superior court of the county wherein the land lies, whose certificate admitting them to probate is to be indorsed thereon.³

¹ Code (1883), §§1246, 1247. Where the acknowledgment is taken before a justice of the peace in the county in which the land lies, and the instrument is presented to the clerk of the superior court for probate, if he adjudges the conveyance and certificate to be in due form, he indorses thereon his own certificate, as follows:

STATE OF..... }
.....COUNTY. }

The foregoing (or annexed) certificate of A. B., a justice of the peace of.....county, is adjudged correct. Let the deed (or other instrument) with the certificate be registered.

(Signature and official seal.)

² Code, §§632, 1248-1250. Where the acknowledgment or proof of privy examination is taken out of the county where the land is situate, or the instrument is required to be registered, or beyond the limits of the state, then in addition to the certificate of adjudication for probate above given, the clerk of the superior court of the county, or the clerk of a court of record in the county and state in which the person taking the examination, acknowledgment or proof resides, shall certify substantially as follows:

STATE OF..... }
.....COUNTY. }

I hereby certify that A. B. (insert the name of the officer taking the acknowledgment or proofs, etc.), was at the time of signing the foregoing certificate (a justice of the peace) in and for the county of....., and State of....., and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and seal of office, this the.....day of....., 18...

[SEAL.]

(Signature and title.)

³ Code, §1250; *Evans v. Etheridge*, 99 N. C. 43. Prior to the Code, all judges were authorized to take acknowledgments. *Dugger v. McKesson*, 100 N. C. 1; s. c. 6 S. E. Repr. 746. Deputy clerks are not authorized to take acknowledgments. *Tatom v. White*, 95 N. C. 453.

See further as to acknowledgments, *Love v. Harben*, 87 N. C. 253; *Starke v. Etheridge*, 71 N. C. 240; *Sellers v. Sellers*, 98 N. C. 13; s. c. 3 S. E. Repr. 917; *Malloy v. Bruden*, 88 N. C. 305; *Told v. Outlaw*, 79 N. C. 235; *Paul v. Carpenter*, 70 N. C. 502; as proof of execution: *Williams v. Griffin*, 4 Jones L. 31.

§435. Acknowledgment of Married Women.

A married woman may own separate property in her own right, whether acquired in any manner before or after marriage, but she can convey only with the written assent of the husband.¹ She is entitled to dower as at common law.² The statute authorizes her to convey by power of attorney, the husband joining therein, and she being separately examined in the acknowledgment thereof.³ A privy examination is necessary to her conveyances and contracts affecting land, and her acknowledgment may be made before any officer authorized by the laws of North Carolina to take acknowledgments.

The form of joint certificate of acknowledgment may be as follows:

STATE OF..... }
COUNTY OF..... }

I (name and title of officer), do hereby certify that , and..... , his wife, the grantors named in the foregoing deed, personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) deed of conveyance (or other instrument); and the said..... , being by me privately examined separate and apart from her said husband touching her free consent to the execution of said deed, doth state that she signed the same freely and voluntarily, of her own will and accord, and without any force, fear or undue influence, and without fear or compulsion of her said husband, or any other person, and that she doth still voluntarily assent thereto, and that she hereby relinquishes her right of dower in the said land.

Witness my hand and seal (private or official, as the case may be), this..... day of....., 18.. Let the said deed with this certificate be registered.

[SEAL.]

(Signature and title).⁴

¹ Const., art. 10, §6. If, of the age of twenty-one, a married woman, with the consent of her husband, may become a free trader: 1, by ante-

nuptial contract, proved and registered; or, 2, by signing, with her husband, a writing, in the following or some equivalent form:

A. B., of the age of twenty-one years, wife of C. B., of.....county, with his consent, testified by his signature hereto, enters herself as a free trader from the date of the registration hereof.

Witness: E. H.

(Signatures.)

This writing is to be proved or acknowledged as in case of a deed, and from the time of its filing in the register's office of the county where the woman proposes to have her principal or only place of business, she shall be a sole trader, authorized to contract and deal as if she were a *feme sole*, Code, ch. 42.

² Code, §2102. She is entitled upon the death of the husband to one-third in value of all the land and other real estate of which her husband was seized during her coverture.

³ Code, §1256. As to wife's contract or deed not acknowledged, see *Burns v. McGregor*, 90 N. C. 222; *Towels v. Fisher*, 77 N. C. 437; *Perry v. Perry*, 99 N. C. 270; s. c. 6 S. E. Repr. 86.

⁴ *Boyd v. Turpin*, 94 N. C. 137; *Clayton v. Rose*, 87 N. C. 106; *Wright v. Player*, 72 N. C. 94; *Woodbourne v. Gorrell*, 66 N. C. 82; *Jones v. Lewis*, 8 Ired. L. 70; s. c. 47 Am. Dec. 338; *Malloy v. Bruden*, 88 N. C. 305; *Skinner v. Fletcher*, 1 Ired. 313; *Lucas v. Cobbs*, 1 Dev. & Bat. 228; *Etheridge v. Ferebee*, 9 Ired. L. 312; *Robbins v. Harris*, 96 N. C. 557; s. c. 2 S. E. Repr. 70; *Sims v. Ray*, 96 N. C. 87; s. c. 2 S. E. Repr. 443.

§436. Proof by Witnesses.

Proof for record may be made by a subscribing witness; and also by other witnesses as to handwriting where the subscribing witnesses and the grantor are dead or non-residents. If the grantor subscribed with a mark only, proof of the signature of the witness is sufficient. Where the instrument has no witness, and its maker is dead or a non-resident, proof of his handwriting is sufficient. Where the witness is dead, proof of his handwriting, or of that of the grantor when there is no witness, is sufficient.¹

The certificate of proof by a subscribing witness may be as follows:

STATE OF..... }
COUNTY OF..... }

Be it remembered that on this.....day of....., 18.., personally appeared before me (name and title of officer) James Jones, the subscribing witness to the fore-

going deed, to me personally known, who on oath duly proves the execution thereof for the purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year above mentioned.

[SEAL.]

(Signature and title.)

¹ Code, §1246; *Love v. Harben*, 87 N. C. 249; *Black v. Justice*, 86 N. C. 504; *Davis v. Higgins*, 91 N. C. 382; *Simpson v. Simpson*, 93 N. C. 373; *Howell v. Ray*, 92 N. C. 510; *Tatum v. White*, 95 N. C. 453; *Carrier v. Hampton*, 11 Ired. 307; *Anderson v. Logan*, 99 N. C. 474; s. c. 6 S. E. Repr. 704; *Jones v. Ruffin*, 3 Dev. 404; *McKinnon v. McLean*, 2 Dev. & Bat. 79; *Starke v. Etheridge*, 71 N. C. 210; *Rollins v. Henry*, 78 N. C. 342.

§437. Effect of Record.

Deeds and instruments of writing for the conveyance or incumbrance of any lands, tenements or hereditaments, must be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded, or filed on record, the same shall be deemed fraudulent, so far as relates to a subsequent *bona fide* purchaser having at the time of purchase no knowledge of the existence of such former instrument.¹ Powers of attorney for the conveyance, mortgage or lease of any estate or interest in real property are executed and acknowledged in the same manner as deeds. They are to be recorded in the county where the land lies, and may then be revoked only by revocation duly recorded. The wife may convey by power of attorney. A deed by virtue of a power may be executed in the name of the attorney, and so acknowledged.² A copy of a recorded instrument is *prima facie* evidence of the instrument and conclusive evidence of its record.³

¹ 1 Rev. Stats., 1880, §4134; Session Laws, vol. 82, p. 230; Ramsey v. Jones, 41 O. St. 685; Doherty v. Stimmel, 40 O. St. 294; Farmer's Bank v. Wallace, 45 O. St. 152; s. c. 12 N. E. Repr. 439; Irving v. Smith, 17 O. 226; Northrup v. Bremer, 8 O. 392; Jennings v. Wood, 20 O. 261; Bank v. Carpenter, 7 O. 68; Leiby v. Wolf, 10 O. 80; McArthur v. Thomas, 2 O. 415; Philly v. Sanders, 11 O. St. 490; Foster v. Dugan, 8 O. 87; s. c. 31 Am. Dec. 432; Blake v. Graham, 6 O. St. 55; s. c. 67 Am. Dec. 360; Graham v. Anderson, 15 O. St. 286; Kyle v. Thompson, 11 O. St. 616; Piatt v. St. Clair, 7 O. 165; Steele v. Spencer, 1 Pet. 552; Hood v. Brown, 2 O. 266; Bell v. Duncan, 11 O. 192; Gill v. Penny, 12 O. St. 38.

² Rev. Stats., §§4106-4110, 4132; Session Laws, vol. 84, p. 133. Except as to mortgages, actual notice is effectual. Woodworth v. Paige, 5 O. St. 70; Morris v. Daniels, 35 O. St. 406; Ranney v. Hardy, 43 O. St. 157; s. c. 1 N. E. Repr. 523; 1 West. Repr. 52; Spader v. Lawler, 17 O. 371; s. c. 49 Am. Dec. 46; Reeder v. Barr, 4 O. 446, 458; Cuninghame v. Buckingham, 1 O. 264, 267.

As to record of town plats, see Lockland v. Smiley, 23 O. St. 94; Satchell v. Doran, 4 O. St. 542; Lebanon v. Warren, 9 O. 80; Price v. Methodist Church, 4 O. St. 515; Wills: Hall's Lessee v. Ashby, 9 O. 96; s. c. 34 Am. Dec. 324; Leases: Ludlow v. Kidd, 3 O. St. 541; Liability of recorder: Ramsey v. Riley, 13 O. 157; Fees: Hoffman v. Mackall, 5 O. St. 124; s. c. 64 Am. Dec. 637; Recitals in patents and deeds: Reeder v. Barr, 4 O. 446, 458; Bonner v. Ware, 10 O. 465; Bell v. Duncan, 11 O. 192.

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³ Rev. Stats., §4143; *Fisher v. Butcher*, 19 O. 406; s. c. 53 Am. Dec. 436.

Private seals, except of corporations, are abolished. Session Laws, vol. 80, p. 79; vol. 81 p. 198.

Possession is notice. *McKinzie v. Perrill*, 15 O. St. 162; *Farmer's Bank v. Wallace*, *supra*; *Bank v. Sawyer*, 38 O. St. 339, 342; *Kelly v. Stansberry*, 13 O. 408; *Hause v. Beatty*, 7 O. 84, 90; *Ranney v. Hardy*, 43 O. St. 157.

§438. Mortgages of Realty.

Mortgages shall take effect from the time the same are delivered to the recorder of the proper county for record, and if two or more mortgages are presented for record on the same day, they shall take effect from the order of presentation for record.¹ Separate record books are kept for the record of mortgages, deeds of trust and powers of attorney for their execution.² Mortgages may be discharged in any customary manner, or by an entry made by the mortgagee upon the margin of the record, or upon the mortgage itself, which latter entry the recorder enters upon the margin of the record.³ No acknowledgment, witness or seal is necessary to such release. The husband should join the wife in a mortgage of her separate real estate.

¹ Rev. Stats. (1880), §4133; *Morgan v. Way*, 16 O. 469; *Smith v. Smith*, 13 O. St. 532; *Kempner v. Campbell*, 44 O. St. 210; s. c. 6 N. E. Repr. 566; 3 West. Repr. 620; *Choteau v. Thompson*, 2 O. St. 114; *Buckingham v. Hanna*, 2 O. St. 551; *Spader v. Lawler*, 17 O. 371; s. c. 49 Am. Dec. 46; *Anketel v. Converse*, 17 O. St. 11; assignments of: *Swartz v. Leist*, 13 O. St. 419.

² *Van Thorniley v. Peters*, 26 O. St. 471; *Smith v. Smith*, 13 O. St. 532. Actual notice of an unrecorded mortgage is ineffectual. *Home Build. Association v. Clark*, 43 O. St. 427; s. c. 2 N. E. Repr. 846; *Holliday v. Franklin*, 16 O. 533; *Magee v. Beatty*, 8 O. 396; *Sturgess v. Bank*, 3 McLean, 140; *Bloom v. Noggle*, 4 O. St. 45; *Bercaw v. Cockerill*, 20 O. St. 163; *Stansell v. Roberts*, 13 O. 148; s. c. 42 Am. Dec. 193; *Mayhem v. Coombs*, 14 O. 428; *White v. Denman*, 1 O. St. 110; but such mortgage is good between the parties: *Home Build. Ass'n v. Clark*, *supra*; *Riley v. Rice*, 40 O. St. 441; *Steward v. Hopkins*, 30 O. St. 502.

³ Rev. Stats., §§4135-4142. As to creditors and purchasers under the recording acts, see *Paine v. Moreland*, 15 O. 435; s. c. 45 Am. Dec. 585; *Farmer's Bank v. Wallace*, 45 O. St. 153; *White v. Denman*, 1 O. St. 110; *Woodruff v. Robb*, 19 O. 212; *Sanborn v. Lockwood*, 9 O. 124; *Roxborough v. Messick*, 6 O. St. 448; s. c. 67 Am. Dec. 346; *Gibler v. Trimble*, 14 O. 323; *Hanes v. Tiffany*, 25 O. St. 549; *Erwin v. Shuey*, 8 O. St. 509; *Vatier v. Lytle*, 7 O. 477.

12038

§439. Acknowledgment may be made within the state before a judge of a court of record, or clerk thereof, a county auditor, county surveyor, justice of the peace, notary public, or mayor. The acknowledgment must be certified on the same sheet on which the instrument is written or printed.¹

Without the state and within the United States, conveyances may be executed and acknowledgment or proof may thereof be made, either in accordance with the Ohio law, or with that of the place where made, before a commissioner of deeds for Ohio, or any officer authorized by the local law to take acknowledgments.²

In foreign countries, before a commissioner of deeds for Ohio, or any consul of the United States resident in any foreign port or country, who must certify to the acknowledgment in the same manner as officers taking acknowledgments within the state.

No proof of the official character of the officer taking an acknowledgment is required.³ There is no particular form for acknowledgments on behalf of corporations. The officer who signs the instrument and affixes the corporate seal makes the usual acknowledgment in behalf of the company.

¹ Rev. Stats. (1880), §4106; Laws 1887, p. 133; *Winkler v. Higgins*, 9 O. St. 599; *Moore v. Moore*, 3 O. St. 154; *Moore v. Vance*, 1 O. 1; *White v. Denman*, 1 O. St. 110; *Smith v. Hunt*, 13 O. 260; s. c. 42 Am. Dec. 201; *Chestnut v. Shane*, 16 O. 599; *Roads v. Symmes*, 1 O. 315; *Crumbaugh v. Kugler*, 2 O. St. 373; *DeSegond v. Culver*, 10 O. 188; *Williamson v. Carskadden*, 36 O. St. 664; *Johnson v. Harris*, 2 O. St. 55; s. c. 15 Am. Dec. 533.

² Rev. Stats., §4111; *Foster v. Dennison*, 9 O. 121; *Eggleston v. Bradford*, 10 O. 312; *Allen v. Parish*, 3 O. 107; *Bailey v. Bailey*, 8 O. 239; *Williams v. Hobson*, 6 O. St. 510; *Meddock v. Williams*, 12 O. 377.

³ Rev. Stats., §4111. A notary need not use his seal. *Fund Commissioners v. Glass*, 17 O. 542.

As to acts validating defective records, see *Barton v. Morris*, 15 O. 408; *Dengenhart v. Cracraft*, 36 O. St. 549; *Lessee of Merritt v. Home*, 5 O. St. 307.

§440. Acknowledgment of Married Women.

The husband and wife may each own, hold and dispose of property, real and personal, the same as if unmarried;

but as each has a dower interest in the real estate of the other, they should join in conveyances and mortgages of realty.¹ A separate examination is not now required in the acknowledgment of the wife. The form of joint certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

Be it remembered that on this.....day of....., A. D. 18.., before me, the subscriber, a (name and title of officer) in and for said state and county, personally came, and....., his wife, and acknowledged the signing of the foregoing instrument to be their act and deed for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal on the day and year last above written.

[SEAL.]

(Signature and title.)

¹ Rev. Stats., §§3110-3114, 4188; Session Laws, vol. 84, p. 133.

² For decisions under former laws requiring privy examination, see *Baldwin v. Snowden*, 11 O. 203; s. c. 78 Am. Dec. 303; *Ford v. Osborne*, 45 O. St. 1; *Ludlow v. O'Neill*, 29 O. St. 181; *Sewall v. Haymaker*, 127 U. S. 719; s. c. 8 Sup. Ct. Repr. 1348; *Goshorn v. Purcell*, 11 O. St. 641; *Ruffner v. McLenan*, 16 O. 639; *Brown v. Farron*, 3 O. 140; *Carr v. Williams*, 10 O. 310; *Card v. Patterson*, 5 O. St. 319; *Rosenthal v. Mayhugh*, 33 O. St. 155; *Newell v. Anderson*, 9 O. St. 12; *Ward v. McIntosh*, 12 O. St. 231.

§441. Witnesses.

Conveyances of realty executed in Ohio require the attestation of two subscribing witnesses, and without them the record of the instrument is ineffectual.¹

¹ Rev. Stats., §4106; *White v. Denman*, 16 O. 59; *Bank v. Carpenter*, 7 O. 68; *Van Thorniley v. Peters*, 26 O. St. 471; *Brown v. Kirkman*, 1 O. St. 116.

§442. Chattel Mortgages not accompanied by change of possession of the property, are absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless forthwith

deposited, or a true copy thereof, with the clerk of the township where the mortgagor resides, or if he be a non-resident of the state, of the township in which the property is situated.¹ Before the mortgage is filed, the mortgagee must enter thereon a verified statement, in dollars and cents, of the amount of his claim, and that it is just and unpaid.² The mortgage may be recorded if desired; otherwise it is kept on file and a full index thereof made by the clerk. The record is good for only one year, unless within thirty days next preceding the end of the year a true copy, together with a verified statement, exhibiting the then interest of the mortgagee in the property, be again filed.

¹ Rev. Stats. (1880), §§4150-4155; Session Laws, vol. 83, p. 72; *Brown v. Webb*, 20 O. 389. Actual notice is effectual. *Paine v. Mason*, 7 O. St. 199.

² Session Laws, vol. 83, p. 72. In townships where the office of the recorder of the county is kept, the mortgage must be deposited with him; or where a mortgagor resides in a township entirely merged in a city or incorporated village, in which the office of county recorder is kept, or where the mortgagor is a non-resident of the state, and the property is within such township, the mortgage shall be filed with the county recorder.

See further as to record of chattel mortgages: *Kilbourne v. Fay*, 29 O. St. 264; *Cooper v. Koppes*, 46 *Id.* 625; s. c. 15 N. E. Repr. 662; *Lawrence v. Everts*, 7 *Id.* 194; *Aultman v. Guy*, 41 *Id.* 593; *Seaman v. Eager*, 16 *Id.* 209; *Biteler v. Baldwin*, 42 *Id.* 125; *Day v. Munson*, 14 *Id.* 488; *Kanaga v. Taylor*, 7 *Id.* 134; s. c. 70 Am. Dec. 62; *Wilson v. Leslie*, 20 O. 161.

As to record of personal property and conditional sales: *Dixon v. Caldwell*, 15 O. St. 412; s. c. 86 Am. Dec. 487; *Call v. Seymour*, 40 O. St. 670; *Sanders v. Kreben*, 28 O. St. 630.

Mechanics' liens must, within four months from the time of performing the labor or furnishing the materials, be filed with the recorder of the county where the labor was done or materials furnished, and upon such filing, the lien takes effect from the date of the first item of the account. Rev. Stats., §§3184, 3185; Session Laws, vol. 87, pp. 46, 47.

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§443. Effect of Record.

Every conveyance of real property within this state hereafter made, which shall not be recorded as provided in this title, within five days thereafter, shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any part thereof, whose conveyance shall be first duly recorded.¹ Certified copies of a recorded instrument may be read in evidence without accounting for the original. Executory contracts, powers of attorney and revocations thereof are to be re-recorded.²

¹ Hill's Annotated Laws of Oregon, 1887, vol. 2, §3027; Laws 1889, p. 86; Baker v. Woodward, 12 Or. 3; s. c. 6 Pac. Repr. 173; Stannis v. Nicholson, 2 Or. 332; Moore v. Thomas, 1 Or. 201; Walker v. Goldsmith, 14 Or. 125; s. c. 12 Pac. Repr. 537.

Actual notice is effectual. Manaudas v. Mann, 14 Or. 450; s. c. 13 Pac. Repr. 449; Musgrove v. Bosner, 5 Or. 313; s. c. 20 Am. Rep. 737; Lyons v. Leahy, 15 Or. 8; s. c. 13 Pac. Repr. 643.

² Hill's Code, §§3023, 3028, 3035, 3036. Possession is notice. Dickey v. Henarie, 15 Or. 351; s. c. 15 Pac. Repr. 464; Manaudas v. Mann, *supra*.

A scroll will answer for a seal. As to Index, see Board v. Babcock, 5 Or. 472. General assignments for benefit of creditors are to be acknowledged as other conveyances of real estate, and recorded in the county where the assignor resides, or the business was carried on.

§444. Mortgages of Realty.

Separate books are kept for the record of mortgages.¹ Where a deed absolute in terms, but defeasible by force of some other instrument, is recorded, the deed and its record is not defeated as against any person other than the maker of the defeasance, or persons having actual knowledge of it, unless the defeasance is also recorded. Assignments of mortgages may be recorded, but the record is not notice to the mortgagor so as to invalidate subsequent payments by him.² Mortgages may be discharged by an entry in the margin of the record, signed by the mortgagee or his personal representative; or by a certificate duly acknowledged or proved and recorded. A penalty of one hundred dollars

is prescribed for failure to make a proper discharge for seven days after request.³

¹ Hill's Code (1887), §3024. A deed absolute in terms, but in reality a mortgage, is to be recorded as a deed. *Haseltine v. Espy*, 13 Or. 301; s. c. 10 Pac. Repr. 493; *Nicklin v. Betts*, 11 Or. 406; s. c. 50 Am. Rep. 472; 10 Pac. Repr. 835.

² Hill's Code, §§3029, 3030. Prior to the statute, an assignment of a mortgage was held not entitled to record as a conveyance of realty. *Oregon Trust Co. v. Shaw*, 5 Sawy. 336; *Watson v. Dundee Mortgage Co.*, 12 Or. 474; s. c. 8 Pac. Repr. 548; *Goodenough v. Warren*, 5 Sawy. 494.

³ Hill's Code, §§3031-3034. A mortgage is deemed real property for purposes of taxation, and the mortgagee must pay the taxes on the mortgage; but it may be stipulated in the mortgage, where the rate of interest is only eight per cent., that the mortgagor shall pay the taxes. As to priority in record, see *Moore v. Thomas*, 1 Or. 201.

As to creditors and purchasers under the recording acts, see *Baker v. Woodward*, 12 Or. 3; s. c. 6 Pac. Repr. 173; *Stannis v. Nicholson*, 2 Or. 332.

§445. Acknowledgment or proof for record may be made within this state before any judge of the supreme court, county judge, justice of the peace, or notary public.

Without the state and within the United States, and in accordance with the law of the place where made, before a judge of a court of record, justice of the peace, notary public, commissioner of deeds for Oregon, or any officer authorized by the law of the place to take acknowledgments. The certificate of an officer of another state must have attached thereto a certificate of the clerk or other proper certifying officer of a court of record of the county or district, certifying to the official character and genuine signature of the acknowledging officer, and that the deed is executed and acknowledged according to the laws of such state or territory.¹

In foreign countries, before a notary public, minister, *chargé d'affaires*, commissioner, or consul appointed by the United States to reside therein. If taken before a notary public, his seal shall be affixed.

¹ Ann. Laws, §§3011, 3014; *Knighton v. Smith*, 1 Or. 276; *Hamlin v. Cassafer*, 15 Or. 456; *Manaudas v. Mann*, 14 Or. 450; *Musgrove v. Bosner*, 5 Or. 313.

Without the double certificate the record is ineffectual. *Knighton v. Smith, supra*; *Musgrove v. Bosner*, 5 Or. 313; s. c. 20 Am. Rep. 737; *Fleschner v. Sumpter*, 12 Or. 161; s. c. 6 Pac. Repr. 506.

§446. Acknowledgment of Married Women.

A married woman may own separate property in her own right, but as husband and wife are entitled to estates of curtesy and dower, they should join in conveyances of realty. A separate examination of the wife is necessary to her acknowledgment, and when the property is within this state she shall acknowledge that she executed the deed freely and voluntarily, unless she lives without the state. The form of joint certificate may be as follows:

STATE OF..... }
COUNTY OF:..... }

This certifies that on the.....day of....., 18.., personally came before me (name and title of officer) in and for said county, the within named....., and....., his wife, to me personally known to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes therein named. And the said....., on examination separate and apart from her said husband, acknowledged to me that she executed the same freely and without fear, coercion or compulsion from any one.

Witness my hand and seal this.....day of....., 18....

[SEAL.]

(Signature and title.)¹

¹ Ann. Laws (1887), §§3015, 3016; Laws, 1889, p. 74; *Harty v. Ladd*, 3 Or. 353; *Moore v. Fuller*, 6 Or. 272.

§447. Proof by Witnesses.

Two witnesses are requisite to a deed executed within the state. Proof for record may be made by a subscribing witness, and only by such a witness, except where the

grantor and the subscribing witnesses are all dead or out of the state.¹

¹ Ann. Laws (1887), §§3018-3022; *McIntyre v. Kamm*, 12 Or. 253; s. c. 7 Pac. Repr. 27. For good certificate, see *Wilson v. McEwen*, 7 Or. 87, 104.

§448. Chattel Mortgages not accompanied by change of possession, are presumptively fraudulent as against creditors and subsequent purchasers in good faith, unless the mortgage be duly filed with the county clerk, to be there kept, or a copy thereof, for public inspection. The record is not good for longer than one year, unless within thirty days next preceding the end of the year an affidavit be duly filed exhibiting the then interest of the mortgagee in the property.¹

¹ Gen. Laws, pp. 262, 527, 756; *Velsian v. Lewis*, 15 Or. 539; s. c. 3 Am. St. Rep. 184; 16 Pac. Repr. 631; *Singer Co. v. Graham*, 8 Or. 17; s. c. 34 Am. Rep. 566. As to re-filing, *J. I. Case Co. v. Campbell*, 14 Or. 460; s. c. 13 Pac. Repr. 324; description of property, *Gregory v. North Pacific*, 15 Or. 447; s. c. 17 Pac. Repr. 143.

Notice of mechanic's lien must be filed with the county clerk. *Ainslie v. Kohn*, 16 Or. 363; s. c. 19 Pac. Repr. 97; *Whittier v. Blakeley*, 13 Or. 546; *Kezartee v. Marks*, 15 Or. 529; s. c. 16 Pac. Repr. 407.

§449. Effect of Record.

Conveyances of realty must be recorded in the office of the recorder of deeds in the county where the lands lie. If executed in Philadelphia county, they must be recorded at once; if in other parts of the state, within six months, and those made out of the state, within twelve months from the execution thereof. If not so recorded, they will be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless recorded before the proving and recording of the deed or conveyance under which the subsequent purchaser or mortgagee claims.¹ Powers of attorney relating to real estate are to be acknowledged and recorded the same as deeds.² Conveyances should be under seal, but an ink scroll will suffice for a seal.³

¹ Brightley's Purdon's Dig. 1872, *Deeds, etc.*: §§71-76; Act of May 25, 1878; Brownback v. Ozias, 117 Pa. St. 93; s. c. 11 Atl. Repr. 30; 9 Cent. Repr. 554; Pancake v. Cauffman, 114 Pa. St. 113; s. c. 7 Atl. Repr. 67; Hulett v. Mut. Ins. Co. 114 Pa. St. 142; s. c. 6 Atl. Repr. 554; Schuchman v. Homestead, 111 Pa. St. 48; s. c. 1 Cent. Repr. 913; McLanahan v. Reeside, 9 Watts, 508; s. c. 36 Am. Dec. 136; Robinson's Appeal, 117 Pa. St. 628; s. c. 12 Atl. Repr. 51; Ashtou's Appeal, 73 Pa. St. 153; Maul v. Rider, 59 Pa. St. 167; Kenyon v. Stewart, 44 Pa. St. 179; Bellas v. McCarty, 10 Watts, 13; Lewis v. Barry, 72 Pa. St. 18; Donaldson v. Phelps, 18 Pa. St. 170; Brook's Appeal, 64 Pa. St. 127; Glading v. Frick, 88 Pa. St. 460; Wood's Appeal, 82 Pa. St. 110.

² Brightley's Purdon's Dig. 1872, *Attorneys in Fact*: §§1, 2. See further as to effect of record, Schell v. Stein, 76 Pa. St. 398; s. c. 18 Am. Rep. 416; Calder v. Chapman, 52 Pa. St. 359; McCandless v. Engle, 51 Pa. St. 309; Singer v. Rook, 84 Pa. St. 442; s. c. 24 Am. Rep. 204; Hall v. Patterson, 51 Pa. St. 289; Lightner v. Mooney, 10 Watts, 467; Souder v. Morrow, 30 Pa. St. 83; Kerns v. Swope, 2 Watts, 75; Cluder v. Thomas, 89 Pa. St. 343; Durand's Appeal, 116 Pa. St. 93; McKean v. Mitchell, 35 Pa. St. 269; s. c. 78 Am. Dec. 335; Lodge v. Simonton, 2 Pen. & W. 439; s. c. 23 Am. Dec. 36; Boggs v. Varner, 6 Watts & S. 469; Bracken v. Miller, 4 Watts & S. 102; Wilson v. McCullough, 23 Pa. St. 440; s. c. 62 Am. Dec. 347; Hill v. Epley, 31 Pa. St. 335; Keller v. Nutz, 5 Serg. & R. 245; Powers v. McFerran, 2 Serg. & R. 44.

³ Actual notice supplies want of registry. Butcher v. Yocum, 61 Pa. St. 168; s. c. 100 Am. Dec. 625; Lahr's Appeal, 90 Pa. St. 507; Bigley v. Jones, 114 Pa. St. 510; s. c. 7 Atl. Repr. 54; Barbour v. Wiehle, 116 Pa. St. 308; s. c. 9 Atl. Repr. 520; Farrington v. Woodward, 82 Pa. St. 259; Epley v. Withrow, 7 Watts, 163; Brinser v. Anderson, 18 Atl. Repr. 520; Maul v. Rider, 59 Pa. St. 167; Sergeant v. Ingersoll, 15 Pa.

St. 343; Mulliken v. Graham, 72 Pa. St. 484; Ripple v. Ripple, 1 Rawle, 386; Bugbee's Appeal, 110 Pa. St. 331; Barnes v. McClinton, 3 Penn. 67; Hottenstein v. Lerch, 104 Pa. St. 454; Carr v. Wallace, 7 Watts, 394; Mullison's Estate, 68 Pa. St. 212; Bellas v. McCarty, 10 Watts, 13.

Possession is notice. Scott v. Gallagher, 14 Serg. & R. 333; s. c. 16 Am. Dec. 508; Leach v. Ansbacher, 55 Pa. St. 85; Plumer v. Robertson, 6 Serg. & R. 179; Krider v. Lafferty, 1 Whart. 203; Wright v. Wood, 23 Pa. St. 120; Johnston v. Irwin, 3 Serg. & R. 291; Billington v. Welsh, 5 Binn. 129; s. c. 6 Am. Dec. 406; Hull v. Powell, 4 Serg. & R. 465; Kerr v. Day, 14 Pa. St. 112; Jaques v. Weeks, 7 Watts, 261; Meehan v. Williams, 48 Pa. St. 238; Boggs v. Varner, 6 Watts & S. 474; Sheets v. Allen, 89 Pa. St. 47; Nelson v. Nelson, 117 Pa. St. 278; s. c. 11 Atl. Repr. 61; 9 Cent. Repr. 401; Woods v. Farmere, 7 Watts, 382; s. c. 32 Am. Dec. 772.

As to record of town plats, see Commissioners v. Wood, 10 Pa. St. 93; s. c. 49 Am. Dec. 592; *In re* Pearl Street, 111 Pa. St. 565; *In re* Brooklyn St., 118 Pa. St. 640; s. c. 4 Am. St. Rep. 618; Commonwealth v. Moorehead, 118 Pa. St. 344; s. c. 4 Am. St. Rep. 599.

§450. Mortgages of Realty.

No mortgage or defeasible deed in the nature of a mortgage shall be good or sufficient to convey or pass any freehold or inheritance or estate for life or years, unless recorded in the office for recording deeds for the county within six months after its date.¹ Mortgages are liens only from the time they are left for record, and if two or more mortgages are left for record on the same day, they have priority according to the time they were left at the recorder's office.² A purchase money mortgage is a lien from the date of its execution, if recorded within sixty days thereafter.³ A defeasance to a deed absolute on its face will not have the effect of reducing it to a mortgage, unless the defeasance is executed and delivered at the same time with the deed, and duly recorded within sixty days from its execution; and such defeasances are indexed and recorded as mortgages.⁴ Mortgages are discharged by entry of satisfaction on the margin of the record, signed by the mortgagee, and to be entered within three months after request, under forfeit in any sum not exceeding the mortgage money, and the rule applies to each installment where the mortgage is pay-

able by installments. Upon a proper decree of court the recorder may himself enter a satisfaction.⁵

¹ Brightley's Dig. 1872, p. 477. The six months' provision does not apply to Philadelphia county in the case of mortgages, as well as that of deeds. Purdon's Ann. Dig., p. 2110, §5.

See as to record and priority of mortgages: Brook's Appeal, 64 Pa. St. 127; Britton's Appeal, 45 Pa. St. 172; Dungan v. Am. Life Ins. Co., 52 Pa. St. 253; City Bank's Appeal, 91 Pa. St. 163; Taylor v. Maris, 5 Rawle, 51; Frick's Appeal, 101 Pa. St. 485; Nice's Appeal, 54 Pa. St. 200; Ter Hoven v. Kerns, 2 Barr, 93; Bank's Appeal, 36 Pa. St. 170; Parker v. Jacoby, 3 Grant's Cas. 300; Hendrickson's Appeal, 24 Pa. St. 363; Schell v. Stein, 76 Pa. St. 398; s. c. 18 Am. Rep. 416; Lahr's Appeal, 90 Pa. St. 507; Campbell's Appeal, 36 Pa. St. 427; s. c. 78 Am. Dec. 375; Mott v. Clark, 9 Pa. St. 399; s. c. 49 Am. Dec. 560; Edwards v. Trumbull, 50 Pa. St. 509. Under act to provide revenue by taxation, Laws 1889, p. 423, recorders of deeds must keep daily record of mortgages.

² Brightley's Dig. 1872, p. 478; Foster's Appeal, 3 Pa. St. 79; Brook's Appeal, 64 Pa. St. 127.

Assignments of mortgages held within the recording acts: Pepper's Appeal, 77 Pa. St. 373; Neider v. Pennypacker, 9 Phila. 86; Phillips v. Bank, 18 Pa. St. 394.

³ Brightley's Pur. Dig. 1872, p. 478; Parke v. Neeley, 90 Pa. St. 52; Dungan v. Am. Life Ins. Co., 52 Pa. St. 253; Lahr's Appeal, 90 Pa. St. 507; Cake's Appeal, 23 Pa. St. 186.

⁴ Laws 1881, p. 84; Hendrickson's Appeal, 24 Pa. St. 363; Luch's Appeal, 44 Pa. St. 519; Edwards v. Trumbull, 50 Pa. St. 509; Jaques v. Weeks, 7 Watts, 261.

The record of a deed absolute in terms is not notice of a mortgage. Carpmann v. Baccastaw, 84 Pa. St. 363; Sankey v. Hawley, 118 Pa. St. 30; s. c. 13 Atl. Repr. 208; Pancake v. Cauffman, 114 Pa. St. 113; s. c. 7 Atl. Repr. 67; Calder v. Chapman, 52 Pa. St. 359; Friedley v. Hamilton, 17 Serg. & R. 70.

⁵ Brightley's Dig. p. 481; Laws 1881, p. 97; Laws 1879, p. 141; Green v. Ricks, 121 Pa. St. 130; s. c. 6 Am. St. Rep. 760; 15 Atl. Repr. 497.

As to creditors and *bona fide* purchasers under the recording acts, see Heister v. Fortner, 2 Binn. 40; s. c. 4 Am. Dec. 417; Britton's Appeal, 45 Pa. St. 172; Hulings v. Guthrie, 4 Pa. St. 123; Chew v. Barnett, 11 Serg. & R. 389; Henry v. Raiman, 25 Pa. St. 384; s. c. 64 Am. Dec. 703; Davidson v. Little, 22 Pa. St. 245; s. c. 60 Am. Dec. 81; Leach v. Anschacher, 55 Pa. St. 85; Uhler v. Hutchinson, 23 Pa. St. 110; Youst v. Martin, 3 Serg. & R. 423; Munn v. McDonald, 10 Watts, 270; Martin v. Jackson, 27 Pa. St. 504; Ashton's Appeal, 73 Pa. St. 153; Spackman v. Ott, 65 Pa. St. 131; Morrison v. Funk, 23 Pa. St. 421; Twelves v. Williams, 3 Whart. 485; Ramsay's Appeal, 2 Watts, 232; Cover v. Black, 1 Pa. St. 493.

The statute provides for chattel mortgages to only a very limited extent; as of leases of collieries, manufactories, etc. Act of April 27, 1885; and iron and steel nails, steel ingots and billets. rolled or ham-

mered steel in sheets, bars or plates, and all steel and iron castings of every description, not in place, may be mortgaged for a sum not less than \$500; the mortgage must be acknowledged and recorded the same as mortgages of realty. Act April 28, 1887; and of saw-logs, sawed lumber, laths, pickets, shingles, hewn timber and spars, and petroleum or coal oil, crude and refined, in tanks, reservoirs, barrels or other receptacles in bulk; also iron tanks and tank cars; iron ore mined and prepared for use, pig-iron, blooms, rolled or hammered iron in sheets or bars, manufactured slate, and canal boats. Act of May 18, 1876. This last act was by its terms limited to a period of five years from its date. It contained, however, a proviso that no mortgage existing at the time of its expiration should be affected by the limitation. Except as above, chattel mortgages are not sanctioned, and are mere pledges, not good as against creditors and third persons, unless possession of the property be taken and retained by the mortgagee. *Bismark Build. Ass'n v. Bolster*, 11 Norris, 123.

§451. Acknowledgment or proof for record may be made within the state before a judge of the supreme court or court of common pleas, mayor, recorder and alderman of Philadelphia, Pittsburgh, Allegheny and Carbondale, the recorders of deeds, notaries public and justices of the peace.

Without the state and within the United States, before any judge of the United States supreme court or district courts, or of the supreme or superior court, or court of common pleas, or of probate, or of record, in any state or territory, under seal of the court; or notary public, or commissioner of deeds for Pennsylvania, or any officer authorized by the local law to take acknowledgments there. The proof of such authority is the certificate of the clerk or prothonotary of any court of record in such state, under seal of the court, that the officer taking such acknowledgment is duly qualified to take the same.¹ Where the person making the acknowledgment is in the military service of the United States, it may be made before an officer holding the rank of major, or any higher rank in said military service, under commission from the governor of Pennsylvania.

In foreign countries, before ambassadors, and other public ministers of the United States, under official seal; consuls and vice-consuls of the United States, under consular seal; any notary public in any foreign country, or commissioner

appointed by the governor of any state or territory or foreign country, whose commissions last five years, unless sooner revoked.²

Brightley's Dig. 1872; *Deeds, etc.*, §§10-30; Act April 22, 1863; Act April 14, 1828; Hagenbuck v. Phillips, 112 Pa. St. 284; s. c. 3 Atl. Repr. 788; Cover v. Manaway, 115 Pa. St. 338; s. c. 2 Am. St. Rep. 552; 8 Atl. Repr. 393; Adam v. Mengle, 8 Atl. Repr. 606; Fuhman v. Loudon, 13 Serg. & R. 386; s. c. 15 Am. Dec. 608; Bennett v. Paine, 7 Watts, 334; s. c. 32 Am. Dec. 765; Angier v. Schieffelin, 72 Pa. St. 106; s. c. 13 Am. Repr. 659; Barney v. Sutton, 2 Watts, 31; Brown v. Phil. Bank, 6 Serg. & R. 484; De Haven's Appeal, 38 Pa. St. 373; Share v. Anderson, 7 Serg. & R. 43; s. c. 10 Am. Dec. 421.

² Acknowledgments taken by commissioners of deeds and notaries public need not be certified, except under their own seals. Act April 14, 1828; Act April 22, 1863; except that as to foreign notaries, it is safer, since the Act of April 27, 1876, to have attached to certificates by them the further certificate of a consul or vice-consul of the United States, that such notaries are the proper officers, and that their acts are in accordance with the laws of their respective countries.

See further as to acknowledgments, Withers v. Baird, 7 Watts, 227; s. c. 32 Am. Dec. 754; Hector v. Glasgow, 79 Pa. St. 79; s. c. 21 Am. Rep. 46; Jamison v. Jamison, 3 Whart. 457; s. c. 31 Am. Dec. 536; Hornbeck v. Build. Assn., 88 Pa. St. 64; Duff v. Wyncoop, 74 Pa. St. 300; Luffborough v. Parker, 12 Serg. & R. 48; Keichline v. Keichline, 54 Pa. St. 75; Pierce v. Hokes, 11 Harris. 230; Cassell v. Cooke, 8 Serg. & R. 268; s. c. 11 Am. Dec. 610; Myers v. Boyd, 96 Pa. St. 427; Scott v. Gallagher, 14 Serg. & R. 333; s. c. 16 Am. Dec. 508; McIntyre v. Ward, 5 Binn. 296; Rigler v. Cloud, 2 Harr. 361; Bowlby v. Thunder, 3 Atl. Repr. 588; Devinney v. Reynolds, 1 Watts & S. 328; Schrader v. Decker, 9 Pa. St. 14; s. c. 49 Am. Dec. 538; Williams v. Baker, 71 Pa. St. 476; Jourdan v. Jourdan, 9 Serg. & R. 268; s. c. 11 Am. Dec. 724; Barnet v. Barnet, 15 Serg. & R. 72.

§452. Acknowledgment of Married Women.

Married women own separate property in their own right, and may execute leases of real property and sales of personal property without the joinder of the husband, but he must join in conveyances of her real estate; and in order to bar dower, she must be joined in his conveyances.¹ No deed or contract relating to real estate, made by the wife, whether relating to her own or her husband's property, is binding on her, unless acknowledged by her as provided by statute. A separate examination of the wife is necessary, and her deed cannot be proved. The form of joint certificate may be as follows:

STATE OF }
 COUNTY OF }

Be it remembered that on the.....day of....., A. D. 18.., before me (name and title of officer) duly commissioned in and for said county, personally appeared the above named....., and....., his wife, and in due form of law acknowledged the foregoing indenture to be their and each of their act and deed, and desired the same might be recorded as such; she, the said....., being of lawful age, and by me examined separate and apart from her said husband and the full contents of said deed being first fully made known to her, did thereupon declare that she did voluntarily and of her own free will and accord sign and seal, and as her act and deed deliver the same, without any coercion or compulsion of her said husband.

Witness my hand and seal the day and year aforesaid.

[SEAL.]

(Signature and title.)²

¹ Act of June 3, 1887; Act of May 25, 1878; Brightley's Purdon's Dig. 1883, *Deeds*, 104.

Where the husband has been adjudged a lunatic, the wife may convey as if *sole*, subject to the control of the court of common pleas. Act of May 25, 1878.

² *Michener v. Cavender*, 38 Pa. St. 334; s. c. 80 Am. Dec. 486; *Hornbeck v. Build. Assn.*, 88 Pa. St. 64; *Williams v. Baker*, 71 Pa. St. 476; *Louden v. Blythe*, 27 Pa. St. 22; s. c. 67 Am. Dec. 442; *McCandless v. Engle*, 51 Pa. St. 309; *Barnet v. Barnet*, 15 Serg. & R. 72; s. c. 16 Am. Dec. 518; *Huffman v. Huffman*, 118 Pa. St. 458; s. c. 12 Atl. Repr. 308; *Mercer v. Watson*, 1 Watts, 330; *Watson v. Bailey*, 1 Binn. 476; s. c. 2 Am. Dec. 462; *Graham v. Long*, 65 Pa. St. 386; *Caldwell's Appeal*, 7 Atl. Repr. 211; *Conklin v. Bush*, 8 Pa. St. 517; *Singer v. Rook*, 84 Pa. St. 442; s. c. 24 Am. Rep. 202; *Miller v. Wentworth*, 82 Pa. St. 280.

For decisions upon statutes validating defective acknowledgment and records, see *Underwood v. Lilly*, 10 Serg. & R. 99; *Tate v. Stoolfooz*, 16 Serg. & R. 351; s. c. 16 Am. Dec. 546; *Green v. Drinker*, 7 Watts & S. 440; *Jourdan v. Jourdan*, 9 Serg. & R. 268; s. c. 11 Am. Dec. 724; *Green v. Weissenberg*, 57 Pa. St. 433; s. c. 98 Am. Dec. 237; *Journeay v. Gibson*, 56 Pa. St. 57; *Shonk v. Brown*, 61 Pa. St. 320; *Lycoming v. Union Bank*, 15 Pa. St. 171; *Lane v. Nelson*, 79 Pa. St. 407.

§453. Proof by Witnesses.

Witnesses are not necessary to the validity of a deed, but two subscribing witnesses are customary, by one of

whom proof for record may be made. The certificate of proof in such case may be as follows:

STATE OF }
COUNTY OF..... }

On the.....day of....., A. D. 18..., before me (name and title of officer) duly commissioned in and for said county, personally appeared C. D., one of the subscribing witnesses to the execution of the above indenture, who being duly sworn (or affirmed) according to law, doth depose and say that he did see A. B., the grantor above named, sign and seal, and as his act and deed deliver, the above indenture (deed or conveyance) for the use and purposes therein mentioned, and that he did also see E. F. subscribe his name thereunto as the other witness of such sealing and delivery, and that the name of this deponent thereunto set and subscribed as a witness is of this deponent's own proper hand-writing.

Sworn (or affirmed) to and subscribed before me, the day and year aforesaid.

Witness my hand and official seal.

[SEAL.]

(Signature and title.)

(Signature of witness.)

If a deed is not acknowledged, and there are no subscribing witnesses, and any of the parties are dead, the hand-writing of such deceased party may be proved by two or more witnesses before any judge, who gives a certificate of such proof. The surviving parties must also be examined, and deeds so proved are entitled to record.¹

Conveyances by corporations should be executed by the corporate seal, attested by the president and secretary. The proof of execution may be made by either officer, and should be certified substantially as follows:

STATE OF..... }
COUNTY OF..... }

Be it remembered that on the.....day of....., A. D. 18..., before me (name and title of officer) personally

came John Smith, who being duly sworn or affirmed according to law, doth depose and say that he was personally present and did see the common or corporate seal of the above named (name of the corporation) affixed to the foregoing indenture or deed poll; that the seal so affixed is the common or corporate seal of the said (name of corporation) and was so affixed by the authority of the said corporation, as the act and deed thereof; that the above named A. B. is the president of the said corporation, and did sign the said indenture or deed poll as such in the presence of this deponent; that this deponent is the secretary of the said corporation, and that the name of this deponent above signed in attestation of the due execution of the said indenture or deed poll, is of this deponent's own proper handwriting.

(Signature of Secretary.)

Sworn to and subscribed before me.

(Official signature and seal of office.)

¹ Act of May 25, 1878. Held not necessary for the witness to sign the affidavit of proof. *Dana v. U. S. Bank*, 5 Watts & S. 223.

Claim for mechanic's lien should be filed in the office of the court of common pleas within six months after the work has been finished or the materials supplied. The claim of mechanics and laborers must not be for less than ten dollars. Act of June 17, 1887; Act of May 21, 1878; *Noll v. Swineford*, 6 Pa. St. 187; Appeal of *Cessna*, 10 Atl. Repr. 1; *Campbell's Appeal*, 36 Pa. St. 247; *Norris' Appeal*, 30 Pa. St. 122; *Hofer's Appeal*, 116 Pa. St. 360; s. c. 9 Atl. Repr. 441; *Odd Fellows v. Masser*, 24 Pa. St. 507; s. c. 64 Am. Dec. 675; *Kennedy v. House*, 41 Pa. St. 39; s. c. 80 Am. Dec. 594.

RHODE ISLAND.

§455. Effect of Record.

All bargains, sales and other conveyances whatsoever of any lands, tenements or hereditaments, whether they be made for passing any estate of free-hold or inheritance, or for a term of years exceeding the term of one year, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed shall be void, unless they be acknowledged and recorded as aforesaid; provided that the same, between the parties and their heirs, shall nevertheless be valid and binding.¹ Deeds must be sealed, and a scroll is not sufficient.²

¹ Public Stats. 1882, p. 443, ch. 173, §4; Williams v. Winsor, 12 R. I. 9; Thurber v. Dwyer, 10 R. I. 355; McCusker v. McEvey, 9 R. I. 525; Wilson v. Conway, 4 R. I. 141; Nichols v. McReynolds, 1 R. I. 30; s. c. 36 Am. Dec. 238.

Town and city clerks are custodians of land records, and recorders of deeds, etc., except in the city of Providence, which has an officer for this purpose, known as recorder of deeds.

² Pub. Stats., ch. 24, §14; ch. 173, §§1, 2. Filing is notice. Nichols v. McReynolds, *supra*.

Actual notice is effectual. Tillinghast v. Champlin, 4 R. I. 173; s. c. 67 Am. Dec. 510; Westerly Sav. Bank v. Stillman, 17 Atl. Repr. 918; and possession is notice: Harris v. Arnold, 1 R. I. 125.

§456. Mortgages, Real and Chattel.

Mortgages of realty are recorded the same as deeds and with like effect. A defeasance must be recorded, otherwise the deed absolute does not operate as a mortgage against a *bona fide* purchaser of the property from the grantee in the deed, and the person entitled to the defeasance is barred of all right of redemption against such second purchaser.¹ Mortgages are discharged of record by an entry of satisfaction by the holder thereof upon the mortgage, or upon the face or margin of the record, or by separate instrument of release and quit-claim to be recorded. Neglect for ten days after request to discharge the mortgage renders the party neglecting liable to make good all damages that may accrue.² Chattel mortgages not accompanied with the possession of the property are not valid

against any other person than the parties thereto, unless recorded in the office of the clerk of the town where the mortgagor resides, or if he be a non-resident of the state, where the property is at the time the mortgage is made. They are recorded in separate books, except that a mortgage of both real and personal property may be recorded with real estate mortgages only, but shall be indexed also on the chattel mortgage record.³

¹ Pub. Stats., ch. 176, §§1, 2. Possession of real estate may be taken by the mortgagee by peaceable and open entry in the presence of two witnesses, whose certificate thereof, acknowledged by the person delivering possession, is to be recorded. This is equivalent to a foreclosure of the mortgage, the mortgagor having the right to redeem within three years. Mechanics' liens must be filed in the office of the town clerk of the town in which the land is situated within sixty days after materials furnished. Laws 1888, p. 209.

² Pub. Stats., ch. 176, §6.

³ Pub. Stats., ch. 176, §9; Laws 1878, ch. 707, §1; Gen. Stats. 1872, ch. 155, §§9, 10. Actual notice supplies the want of registry. Chattel mortgages are usually foreclosed under power of sale in the mortgage, but foreclosure may also be effected by possession for sixty days after breach of condition.

§457. Acknowledgment may be made within the state before a senator, judge, justice of the peace, notary public or town clerk.

Without the state and within the United States, before any judge, justice of the peace, mayor or notary public, or commissioner of deeds for Rhode Island.

In foreign countries, before any ambassador, minister, *chargé d'affaires*, recognized consul, vice-consul, or commercial agent of the United States, or before a commissioner of deeds appointed and qualified in the country in which such deed or instrument is executed.¹ Neither proof of identity nor certificate thereof is required.

¹ Pub. Stats., ch. 173, pp. 443, 444; ch. 17, §4. In case of refusal, the grantor may be compelled to acknowledge by summary proceeding by complaint and warrant.

The statute does not prescribe any special form for executing conveyances by corporations. The president or treasurer, duly authorized by vote, usually affixes the corporate seal, etc., signs the corporate name by (himself, adding his official designation), and acknowledges the instrument as the deed of the corporation.

§458. Acknowledgment of Married Women.

A married woman may own separate property in her own right, but the husband should join in the conveyance of her separate real estate. She is entitled to dower in the husband's lands, and in order to bar the right, she should join in his conveyance, though the husband only need acknowledge it. Separate examination of the wife is necessary in the conveyance of her real estate. The form of joint certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

Be it remembered that on this.....day of....., A. D. 18.., before me (name and title of officer) personally appeared....., and....., his wife, and the said acknowledged the foregoing instrument by him signed to be his free and voluntary act and deed; and the said....., being by me examined privily and apart from her said husband, and having said instrument shown and explained to her by me, declared to me that it is her voluntary act and that she does not wish to retract the same.

In witness whereof I have set my hand and seal at , the day and year above written.

[SEAL.]

(Signature and title.)¹

¹ Pub. Stats., ch. 166, §8; *Paine v. Baker*, 15 R. I. 100; s. c. 1 N. Eng. Repr. 153; *Bateman's Petition*, 11 R. I. 393; *Kavanah v. Day*, 10 R. I. 393; *Warner v. Peck*, 11 R. I. 471; *Churchill v. Moore*, 1 R. I. 209.

§459. Proof by Witnesses.

A deed without a witness is good, although it is usual to have one. There is no proof by subscribing witness, except before a court in this state when the grantor has died or removed out of the state before acknowledging the deed.¹

¹ Pub. Stats., ch. 173, §§6-8. Such proof may be made before the supreme court, or court of common pleas.

A claim of mechanic's lien must be filed with the town clerk of the town wherein the estate lies within four months after default in any payment under written contract, or after notice by a sub-contractor to the owner, and within six months after commencing work under verbal contract with the owner. *Id.*, ch. 177; now sixty days. Laws 1888, p. 209.

SOUTH CAROLINA.

§460. Effect of Record.

All conveyances, writings, deeds of trust and mortgages of or affecting real or personal property, including leases for more than one year, statutory liens and renunciations of dower, shall be valid so as to affect from the time of their delivery or execution the rights of subsequent creditors or purchasers for valuable consideration without notice only when recorded within forty days from the time of such delivery and execution; provided that if recorded subsequently to such period of forty days, they shall be valid as aforesaid from the date of such record.¹ A recorded deed may be read in evidence without further proof of its execution.² The place of record is the office of the clerk of the court of common pleas in each county, except that in Charleston and Greenville, the proper office is that of the register of mesne conveyances. Marriage contracts are to be recorded not only in the county of the residence of the parties, but also in the office of the secretary of state in Columbia.³

¹ Gen. Stats. 1882, §§1776, 769, 1810; *Martin v. Sale*, 1 Bail. Eq. 1; *Steele v. Mansell*, 6 Rich. 443; *Bloom v. Simms*, 27 S. Car. 90; s. c. 3 S. E. Repr. 45; *Carraway v. Carraway*, 27 S. Car. 576; s. c. 5 S. E. Repr. 157; *Wood v. Ingraham*, 3 Strobb. Eq. 105; s. c. 51 Am. Dec. 671; *Wragg v. Compt. Gen.*, 2 Desaus. 509; *McCorkle v. Montgomery*, 11 Rich. Eq. 132; *Hutzler v. Phillips*, 26 S. Car. 136; 1 S. E. Repr. 502; *Piester v. Piester*, 22 S. Car. 139; *City Council v. Paige*, *Spear's Eq.* 159; *McFall v. Sherrard*, Harp. 295; *Boyce v. Shiver*, 3 S. Car. 515; *Massey v. Thompson*, 2 Nott & McC. 105; *Stokes v. Hodges*, 11 Rich. Eq. 135; *Dawson v. Dawson*, *Rice Eq.* 243.

Possession is not notice where the instrument is not recorded. Actual notice, to supply the place of registration, must be of the instrument itself, or of its nature and purport. Laws 1888, p. 15.

As to record during and after the forty days: *King v. Fraser*, 23 S. Car. 543; *Leger v. Doyle*, 11 Rich. Eq. 118; *McNamee v. Huckabee*, 20 S. Car. 190; *Steele v. Mansell*, *supra*; *Alston v. Alston*, 2 Tread. Const. Rep. 604; s. c. 4 S. Car. 116; *S. Car. Loan Co. v. McPherson*, 26 S. Car. 431; s. c. 2 S. E. Repr. 367.

² Gen. Stats., §2225; *Peay v. Pickett*, 3 McCord, 318; *Gourdin v. Heirs of Barino*, 1 Harp. 221.

Actual notice supplies the want of registry. *Tart v. Crawford*, 1 McCord, 475; *Cabiness v. Mahon*, 2 McCord, 273.

Possession as notice. *Graham v. Nesmith*, 24 S. Car. 380; *Bieman v. White*, 23 S. Car. 490; *Shearn v. Robinson*, 22 S. Car. 32.

³ Gen. Stats., §§1776, 2038, 2039. Conveyances must be sealed by the grantors, §1775; and are notice from the time they are filed for record, §769. Certificates or titles issued by or under authority of the United States district tax commissioners for South Carolina, are legal notice when recorded in the record office of Beaufort county. §1783.

See further as to effect of record, *Martin v. Quattlebaum*, 3 McCord, 205; *Penniman v. Hart*, 2 Bay, 251; *Woolfolk v. Graniteville Co.*, 22 S. Car. 332; *Thompson v. Bullock*, 1 Bay, 367; *Lessee of Gordon v. Parsons*, 1 Bay, 90; *Mims v. Chandler*, 21 S. Car. 480.

§461. Mortgages of Realty are recorded as other conveyances of realty under the statutes cited in the last section.¹ They may be discharged of record by an entry of satisfaction, in the proper office, on the mortgage, by the person receiving payment. Neglect for three months after request to enter satisfaction, renders the party liable in a sum not exceeding one-half the mortgage debt.²

¹ Gen. Stats., §1776; *Tibbetts v. Langley*, 12 S. Car. 465; *Williams v. Beard*, 1 S. Car. 309; *Barnwell v. Porteus*, 2 Hill Ch. 221; *McKnight v. Gordon*, 13 Rich. Eq. 222; s. c. 94 Am. Dec. 164; *King v. Fraser*, 23 S. Car. 543; *Charleston v. Ryan*, 22 S. Car. 339; s. c. 53 Am. Rep. 713; *Colmes v. McCracken*, 8 S. Car. 87; *Piester v. Piester*, 22 S. Car. 139.

² Gen. Stats., §1791, pp. 427, 428. The marginal entry does not require two witnesses. *City Council v. Ryan*, 22 S. Car. 339; see also, *Mosely v. Hankinson*, 23 S. Car. 519; *Williams v. Cudd*, 26 S. Car. 213; s. c. 2 S. E. Repr. 14. An assignee of a mortgage takes it subject to all equities. *Moffatt v. Hardin*, 22 S. Car. 9.

As to creditors and purchasers under the recording acts, see *Miles v. King*, 5 S. Car. 146; *Haynsworth v. Bischoff*, 6 S. Car. 159; *McKnight v. Gordon*, *supra*.

Mechanics' liens must be filed with the register of mesne conveyance within ninety days after labor or material furnished. Laws 1884, p. 823.

§462. Acknowledgment of Married Women.

Deeds are not acknowledged, but proven for record by a subscribing witness. The only acknowledgment now provided for in the statute is to a relinquishment of dower by the wife. She may convey her separate property as if *sole*,¹ but should join in a deed of the husband, and before a court or officer designated by the statute,² and on the deed, or in some separate instrument, renounce her dower in the manner shown in the following certificate:

STATE OF..... }
 COUNTY OF..... }

I (name and title of officer) do hereby certify unto all whom it may concern that A. B., the wife of the within named C. B., did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily and without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within named E. F., his heirs and assigns, all her interest and estate, and also all her right and claim of dower of, in or to all and singular the premises within mentioned and released.

(Signed by wife.) A. B.

Given under my hand and seal, this.....day of
, A. D. 18...

[SEAL.]

(Signature and title).³

¹ Gen. Stats., §§2035-2037. A deed or mortgage of her separate property requires neither acknowledgment nor joinder of the husband. §2036; Laws 1887, p. 819.

² Gen. Stats., §§1796, 1797. Within the state the acknowledgment may be made in open court, or before any judge of the court of common pleas, or justice of the supreme court, judge of probate, or clerk of the court of common pleas, and also before any officer within or without the state, authorized to take affidavit of deeds, as stated in the next section.

³ Gen. Stats., §1797; *Mosely v. Hankinson*, 23 S. Car. 519; *Williams v. Cudd*, 26 S. Car. 213; s. C. 2 S. E. Repr. 14.

See as to conveyances by the wife, and as to renunciations of inheritance under former laws, *Alston v. Alston*, 4 S. Car. 116; *Crenshaw v. Julian*, 26 S. Car. 283; s. C. 4 Am. St. Rep. 719; 2 S. E. Repr. 133; *Wingo v. Parker*, 19 S. Car. 13; *Gaffney v. Peeler*, 21 S. Car. 59; *McLaurin v. Wilson*, 16 S. Car. 402; *McCreary v. McCreary*, 9 Rich. Eq. 34.

§463. Proof by Witnesses.

The statute requires that deeds for the conveyance of real estate must be signed and sealed in the presence of two subscribing witnesses.¹ Proof for record may be made by a subscribing witness, as also the acknowledgment of a wife, within the state before a trial justice or notary public.

Without the state, before a commissioner of deeds for South Carolina, or before commissioners appointed under

dedimus issued by the clerk of the court of the county in which the deed is to be recorded, or before the clerk of a court of record, who must use his official seal; or before a notary public, who must use his official seal, accompanied by the certificate of the clerk of a court of record of the state in which the attestation is made that he is a notary; or without the United States, before a consul or vice-consul of the United States. The certificate of proof must be subscribed by the witness, and may be as follows:

STATE OF..... }
COUNTY OF..... }

Personally appeared before me E. F., and made oath that he saw A. B. and C. B., his wife, sign, seal and deliver as their act and deed the within conveyance for the uses and purposes therein mentioned, and that he, with G. H., in the presence of each other, witnessed the due execution thereof. E. F.

Sworn to before me this.....day of....., A. D. 18....

[SEAL.]

(Signature and title.)²

¹ Gen. Stats., §§1775, 2018; 1 Cheve's Law, 271; Little v. White, 7 S. E. Repr. 72; McGowen v. Reed, 27 S. Car. 62; Woolfolk v. Graniteville Co., 22 S. Car. 332.

² Gen. Stats., §§768, 1777; Webb v. Chisholm, 24 S. Car. 487; Campbell v. Moon, 16 S. Car. 107; Wood v. Reeves, 23 S. Car. 382; Hillegas v. Hartley, 1 Hill Ch. 106; Monks v. Jenkins, 2 Hill Ch. 9; Lamar v. Raysor, 7 Rich. Eq. 509.

§464. Chattel Mortgages and deeds of trust of personal estate are valid so as to affect from the time of their delivery or execution the rights of subsequent creditors or purchasers for value without notice, only when recorded within forty days from their delivery or execution in the county where the mortgagor resides, or if he be a non-resident of the state, in the county where the property is situated. Record after the forty days is effectual from the time it is made.¹ Conditional sales of personal property,

which is delivered to the vendee, are required to be recorded.²

¹ Gen. Stats., §1776; Laws 1876, p. 92; *Loyns v. Tedder*, 7 S. E. Repr. 69. Possession of a stock of mortgaged goods retained by the mortgagor, who continued to carry on the business, held not such a badge of fraud as to vitiate the mortgage. *Hirskhind v. Israel*, 18 S. Car. 157.

² Gen. Stats., §2022; Laws 1882, p. 20; *Herring v. Cannon*, 21 S. Car. 212; s. c. 53 Am. Rep. 661; *Ludden v. Dusenbury*, 27 S. Car. 464; s. c. 4 S. E. Repr. 60.

TENNESSEE.

§465. Effect of Record.

No deed of conveyance for lands shall be good and available in law as to strangers, unless the same be acknowledged by the vendor or proved by two witnesses on oath and registered in the county where the land lies.¹ Instruments conveying or affecting title to real or personal property not so proved or acknowledged and registered or noted for registration shall be null and void as to existing or subsequent creditors, and as to *bona fide* purchasers from the makers without notice; and in case of marriage contracts, shall be void as to existing or subsequent creditors of the husband or purchasers from him without notice.² All instruments are notice from the time they are filed or noted.³ The statute is very full and specific in its enumeration of instruments that may be recorded, including nearly every character of writing that can affect the title to real or personal property.⁴

¹ Code of Tenn. (1852), §2005; Code, (Mil. & Ver.) 1884, §2811; *Boyce v. Stanton*, 15 Lea, 346; *McCulloch v. Endaly*, 3 Yerg. 346; *Martin v. Nebblett*, 2 Pick. 383; s. c. 7 S. W. Repr. 123; *Lally v. Holland*, 1 Swan, 396; *Baldwin v. Marshall*, 2 Humph. 116; *Smith v. Neilson*, 13 Lea, 461; *Shields v. Mitchell*, 10 Yerg. 8; *Craig v. Leiper*, 2 Yerg. 193; s. c. 24 Am. Dec. 479; *White v. Nashville Ry. Co.*, 7 Humph. 518; *Green v. DeMoss*, 10 Humph. 371; *Lea v. Polk Co.*, 21 How. (62 U. S.) 493; *Sharp v. Fly*, 9 Baxt. 4; *Clark v. Arnold*, 2 Hay. 287; *Jarman v. Farley*, 7 Cold. 141; *High v. Batts*, 10 Yerg. 335; *Worley v. State*, 7 Lea, 382.

² Code (M. & V.), §2890. Actual notice supplies want of registry. *Otis v. Payne*, 2 Pick. 663; s. c. 8 S. W. Repr. 848; *Macon v. Shephard*, 2 Humph. 335; *Tagg v. Tenn. Nat. Bank*, 9 Heisk. 479; *Myers v. Ross*, 3 Head, 60; *Murrell v. Watson*, 1 Tenn. Ch. 342; *Vance v. Masterson*, 3 Humph. 619; *Bledsoe v. Rogers*, 3 Sneed, 466; except as against creditors: *Lookout Bank v. Noe*, 1 Pick. 21; s. c. 5 S. W. Repr. 433; *Lyle v. Langley*, 6 Baxt. 286. and cases cited in notes to next section.

³ Code (M. & V.), §§2887, 2888; *Woodward v. Boro*, 16 Lea, 678; *Swenson v. Bank*, 9 Lea, 713; unless the instrument is withdrawn before record: *Hickman v. Perrin*, 6 Cold. 135.

Possession is notice. *Randolph v. Meeks*, Mart. & Y. 58; *Macon v. Shephard*, *supra*; *Mitchell v. Churchman*, 4 Humph. 218.

⁴ Code (M. & V.). §2837. It specifies agreements and bonds; powers of attorney and revocations thereof; bills of sale; certified copies from other counties; mortgages and trust deeds; discharges and releases; all other deeds of every description; plats; pre-emption transfers;

leases for over three years; wills from other states; memoranda of judgments and decrees, and others besides. Where a conveyance contains several tracts lying in different counties, it must be recorded in each of them; but if only one tract lying in two or more counties, it may be registered in either. §2843.

Record of bond for title is notice. *McFarran v. Knox*, 5 Cold. 217; *Morgan v. Snell*, 3 Baxt. 382; but not an assignment of a bond: *Kelly v. Thompson*, 2 Heisk. 281.

§466. Mortgages of Realty are recorded as other conveyances and with like effect.¹ They are not good as against creditors, whether with or without actual notice, until duly filed for registration.² They may be discharged of record by a deed of release duly recorded, or by an entry in the margin of the record made by the proper person and witnessed by the registrar. The statute prescribes the form of acknowledgment of satisfaction.³

¹ *Ruggles v. Williams*, 1 Heisk. 141; *Turbeville v. Gibson*, 5 Heisk. 374; *Shields v. Dyer*, 2 Pick. 41; s. c. 5 S. W. Repr. 439; *Christian v. Clark*, 10 Lea, 630; *Moore v. Walker*, 3 Lea, 656.

² Actual notice of an unregistered conveyance does not affect creditors. *Lillard v. Ruckers*, 9 Yerg. 64; *Butler v. Maury*, 10 Humph. 420; *Coward v. Culver*, 12 Heisk. 541; *Chester v. Greer*, 5 Humph. 26; *Green v. Goodall*, 1 Cold. 412; *Stanley v. Nelson*, 4 Humph. 484; *Miller v. Estill*, 8 Yerg. 452; *Nailer v. Young*, 7 Lea, 737; *Sharp v. Fly*, 9 Baxt. 5; *Wilson v. Eifler*, 11 Heisk. 188; *Morgan v. Elam*, 4 Yerg. 375; *Ingram v. Morgan*, 4 Humph. 66; *Baldwin v. Baldwin*, 2 Humph. 476; *Washington v. Trousdale*, Mart. & Y. 385; *Carnis v. Jones*, 5 Yerg. 249.

³ Code (M. & V.), §§2839, 2840; *Swenson v. Bank*, 9 Lea, 713.

In mechanic's lien, a statement of amount due for work or materials furnished shall be filed with the county register within thirty days after work done. Laws 1887, p. 165.

§467. Acknowledgment or proof for record may be made within the state before clerks of county courts and their deputies and notaries public.

Without the state and within the United States, before a commissioner of deeds for Tennessee, a notary public, or any court of record, or the clerk thereof. If made before a court, the copy of the entry on the record shall be verified by the clerk under his seal, and if before a clerk, his official character must be certified to by the presiding judge.

In foreign countries, before a commissioner of deeds for Tennessee, a notary public, consul, minister, or ambassador of the United States. Certificates of probate or acknowledgment without the state must be under the official seal of the officer.¹

¹ Code (M. & V.), §§2851-2855; Laws 1870, ch. 74, §§1-4; *Shields v. Netherlands*, 5 Lea, 193; *Stinson v. Russell*, 2 Tenn. 40. The word "purposes" must not be omitted. *Currie v. Kerr*, 11 Lea, 138. The officer must certify the identity of the person making the acknowledgment or proof. The register receives one mill on the dollar for foreign deeds sent to him for record. Notaries, commissioners, consuls, ministers and ambassadors must use their official seals. Code (M. & V.), §2856; *Garth v. Fort*, 15 Lea, 683.

Where the absence of the original is accounted for, a certified copy of a duly recorded instrument is *prima facie* evidence of its contents and execution. Code (M. & V.), §2886.

§468. Acknowledgment of Married Women.

The wife may own separate property in her own right, and may convey such property without the joinder of the husband, and also, it seems, without privy examination;¹ especially if the instrument creating the estate gives her in relation thereto all the powers of a *feme sole*.² Where the husband joins, as in conveyances of her general estate, or where both join in conveying the homestead, a privy examination is required. The form of certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

Before me (name and title of officer) personally appeared....., and....., his wife, the within named bargainors, with whom I am personally acquainted, and who severally acknowledged that they executed the within deed (or other instrument) for the purpose therein contained; and the said....., wife of said....., with whom I am personally acquainted, having appeared before me privately and apart from her said husband, acknowledged the execution of said deed to have been done by her freely, voluntarily and understandingly, without compulsion or

constraint of her said husband and for the purposes therein expressed.

Witness my hand and seal of office, at office, this. . . . day of, A. D. 18. . .

[OFFICIAL SEAL.]

(Signature and title.)³

¹ Code (M. & V.), §§3347, 3350; *Robertson v. Queen* (Tenn.), 11 S. W. Repr. 38, with dissenting opinion.

² Code (M. & V.), §3350; *Sherman v. Turpin*, 7 Cold. 382; *Robertson v. Queen*, *supra*.

³ Code (M. & V.), §§2891-2893; *Mount v. Kesterson*, 6 Cold. 464; *Edmondson v. Harris*, 2 Tenn. Ch. 427; *Coal Creek Co. v. Heck*, 15 Lea, 497, 513; *Morgan v. Elam*, 4 Yerg. 375; *Young v. Young*, 7 Cold. 461; *Johnston v. Walton*, 1 Sneed, 258; *Laird v. Scott*, 5 Heisk. 314; *Henderson v. Rice*, 1 Cold. 223; *Shields v. Netherlands*, 5 Lea, 198; *Harrison v. Wade*, 3 Cold. 585; *Fall v. Roper*, 3 Heisk. 486; *Fredenwold v. Mulen*, 10 Heisk. 226.

The word "understandingly" cannot be omitted. *Anderson v. Bewley*, 11 Heisk. 29; *Wright v. Dufield*, 2 Baxt. 218. In a joint certificate, the identity of the wife need not be certified. *Bell v. Lyle*, 10 Lea, 44. The wife cannot convey by power of attorney. *Pilcher v. Smith*, 2 Heisk. 209.

Where the wife is sick, so that her acknowledgment cannot conveniently be taken by the county clerk, he may issue a commission to a justice of the peace, authorizing the justice to take it. §2892. Where the acknowledgment is defectively certified, the clerk may correct it upon making affidavit of correction in open court. §§2895, 2896; *Grotenkemper v. Carver*, 4 Lea, 379; *Brinkley v. Tomeny*, 9 Baxt. 275.

§469. Proof by Witnesses.

Conveyances do not require witnesses if acknowledged. They may be probated for record upon the evidence of two attesting witnesses. The certificate of proof may be as follows:

STATE OF }
COUNTY OF }

Before me (name and title of officer) personally appeared E. F. and G. H., subscribing witnesses to the within deed (or other instrument), and who being first duly sworn, deposed and said that they are acquainted with A. B., the bargainor (or as the name may be), and that he acknowledged the same in their presence to be his act and deed, on the day of, A. D. 18. . .

Witness my hand and seal of office, at office, this....day
of....., A. D. 18...

[OFFICIAL SEAL.]

(Signature and title.)¹

¹ Code (M. & V.), §§2850, 2860, 2873; *Crockett v. Campbell*, 2 Heisk. 411; *Tate v. Laurence*, 11 Heisk. 503; *Harrison v. Wade*, 3 Cold. 505; *Lea v. Polk County*, 21 How. (U. S.) 493; *McGuire v. Hay*, 6 Humph. 419; *Hightower v. Wells*, 6 Yerg. 249. The proof must be by two witnesses. *Batte v. Stone*, 4 Yerg. 168.

§470. Chattel Mortgages and deeds of trust of personal property are recorded as other conveyances and mortgages, and with like effect, except that the record must be made in the county of the vendor's residence, unless he be a non-resident of the state, in which case the record is in the county where the property is.¹

¹ Code (M. & V.), §§2837, 2890, 2844; *Parker v. Hall*, 2 Head, 641. Recorded chattel mortgage lien on a horse superior to subsequent lien of a livery stable keeper, under Code (M. & V.), §2760. *McGehee v. Edwards*, 11 S. W. Repr. 316.

Notice of mechanics' liens must be filed with the county registrar. Code (M. & V.), §§2745-2748; Act of April 2, 1881; Act of 1887, ch. 85. Retention by a seller of title to machinery placed on land until the price is paid, with a reservation of the right, in case of default in payment, to take possession of and remove such machinery without process, is not a waiver of the lien given by Code Tenn. §2739, on any lot of ground for the price of machinery furnished or erected thereon. *Case Manuf'g Co. v. Smith*, U. S. C. C. (Tenn.), 40 Fed. Rep. 339.

TEXAS.

§471. Effect of Record.

All conveyances whatsoever of lands, whether made for passing estates of freehold, or inheritance, or for a term of years, all deeds of settlement upon marriage, and all deeds of trust and mortgages whatsoever, are void as to all creditors and subsequent purchasers for valuable consideration without notice, unless duly acknowledged or proved and filed with the county clerk for record.¹ Registry is to be made in the county in which the real estate, or a part thereof, is situated, except that where the land lies in an unorganized county, the record is to be made in the county to which such unorganized county is attached for judicial purposes.² Instruments are notice from the time they are delivered to the clerk for record.³ The record, when duly made, is declared constructive notice to all persons.⁴ Certified copies of patents, and of archives of the general land office, and from the records of any county the public record of which has been lost, destroyed or carried away, and of duly probated wills, may be recorded with the effect of notice.⁵ The re-record of an instrument once properly recorded is declared not legally necessary because of the creation of new counties or subsequent change of county lines.⁶ The statute makes provision for supplying lost and destroyed records.⁷

¹ Rev. Stats.* 1879, §4332. The statute authorizes the record of "all * * * instruments of writing concerning any lands and tenements, or goods and chattels, or movable property of any description." §4331; but, as shown above, the succeeding section, defining the effect of record, or want of record, is not so broad in its terms, and it is held that transfers of personal property and choses in action are not entitled to record, unless elsewhere required by statute: *Pegram v. Owens*, 64 Tex. 475; *Burnham v. Chandler*, 15 Tex. 441; *ante*, §§40, 245; *post*, §475.

² Rev. Stats., §4333; Laws 1887, p. 94; Sayles' Stat., §4333; Laws 1881, p. 72; Sayles' Stat., §4333; *Adams v. Hayden*, 60 Tex. 223; *Jones v. Powers*, 65 Tex. 207.

(*) The references in these notes to the Revised Stats. of 1879, which is the latest official compilation, will answer also for references to Sayles' Annotated Stats. of 1888, as the numbering of the later work corresponds with that of the former. For session laws of 1888 and 1889, separate reference is given to the addenda vol. (1889) of Sayles' Stats.

Prior to the Act of 1881 there was no law requiring that titles to land in unorganized counties should be recorded in the county to which such unorganized counties were attached for judicial purposes. * * * * The land having been in Bexar county prior to the creation of Taylor county, there being no statute then directing that the deed be recorded in any particular county, its registration in Bexar county was proper, and was constructive notice to subsequent purchasers—although Taylor county was at the date of such record attached for judicial purposes to a county other than Bexar. *Baker v. Beck* (Tex.), 12 S. W. Repr. 229, citing *Alford v. Jones*, 71 Tex. 519; s. c. 9 S. W. Repr. 470.

³ Rev. Stats., §4334; *Throckmorton v. Price*, 28 Tex. 605; s. c. 91 Am. Dec. 334; *Freiberg v. Magale*, 70 Tex. 116; *Crews v. Taylor*, 56 Tex. 461. The instrument “shall be considered as recorded from the time it was deposited for record.” §4299. Yet the record held invalid, because the clerk failed to copy the certificate of acknowledgment. *Taylor v. Harrison*, 47 Tex. 454; s. c. 26 Am. Rep. 304. See *ante*, §§16–18.

⁴ Rev. Stats., §4342. That the subsequent purchaser vainly searched the records for a recorded deed, cannot change the rule. *Edwards v. Barwise*, 69 Tex. 84; s. c. 6 S. W. Repr. 677.

Registry not notice where there is a break in the recorded title. *Watson v. Chalk*, 11 Tex. 93; *Lumpkin v. Adams* (Tex.), 11 S. W. Repr. 1070; *Word v. Box*, 66 Tex. 596; *post*, §158.

A perfect record title protects a purchaser without actual notice of defect. *Edwards v. Brown*, 69 Tex. 84; s. c. 6 S. W. Repr. 677; *Link v. Page*, 72 Tex. 592; *Wright v. Lassiter*, 71 Tex. 640; s. c. 10 S. W. Repr. 295; *ante*, §154.

⁵ Rev. Stats., §§4337, 4330, 4291, 4876. Without express statutory authority, the record of a certified copy is of no effect. *Uhl v. Musquez*, 1 Tex. Un. Cas. 650; *ante*, §56. Patents may be recorded without acknowledgment: §4329; but they are notice without record. *Stevens v. Geiser*, 71 Tex. 140; s. c. 8 S. W. Repr. 610; *Ney v. Mumme*, 66 Tex. 268; *Evitts v. Roth*, 61 Tex. 81. See *ante*, §25, and *Rio Grande Ry. Co. v. Milmo Nat. Bank*, 72 Tex. 467.

⁶ Rev. Stats., §4358. This was the rule before the statute. *McKissick v. Colquhoun*, 18 Tex. 148, and cases cited *ante*, §187.

⁷ Rev. Stats., §§4286–4293; *Johnson v. Skipworth*, 59 Tex. 493; *ante*, §187. Destroyed record presumed after lapse of long time, when. *Harrison v. McMurray*, 71 Tex. 122; s. c. 8 S. W. Repr. 612; *White v. Jones*, 67 Tex. 638; s. c. 4 S. W. Repr. 161.

Powers of attorney, marriage contracts and official bonds are to be recorded in books provided for that purpose. §4336; *Watson v. Mercer*, 27 Tex. 637.

See as to record of bonds for title, *Catlin v. Bennatt*, 47 Tex. 165; *Scarborough v. Arrant*, 25 Tex. 129; *York v. McNutt*, 16 Tex. 13; 67 Am. Dec. 607; *ante*, §38.

§471a. Effect of Record—Continued.

A duly recorded instrument, or a certified copy thereof, the absence of the original being first accounted for, is ad-

missible in evidence without proof of execution.¹ Abstracts of judgments affecting realty,² copies of decrees of partition of realty,³ notices of the levy of writs of attachment on real estate,⁴ and transcripts of judgments of justices of the peace under which land has been sold, are to be recorded in the office of the county clerk.⁵ The statute denounces a penalty of not exceeding five hundred dollars and all actual damages against the clerk for any neglect of duty or official misconduct as recorder.⁶ Certified copies of a will duly probated in Texas may be recorded in other counties, and may be used in evidence as the originals might be. Where a will conveying lands in Texas is probated in another state, a duly certified copy of the will and its probate may be recorded in the county wherein the land lies, without further proof or authentication, or probate in Texas.⁷

¹ Rev. Stats., §2257; *Belcher v. Fox*, 60 Tex. 527; *Ballard v. Perry*, 28 Tex. 347; *ante*, §56. The statute applies to a duly recorded bill of sale. *Morrow v. State*, 22 Ct. App. 239; s. c. 2 S. W. Repr. 624; and to a copy of a patent, where the copy is taken from the county records: *Rio Grande, etc., Ry. Co. v. Milmo Nat. Bank*, 72 Tex. 467; but where the copy offered in evidence is from the general land office, the non-production of the original need not be accounted for. *Ney v. Mumme*, 66 Tex. 268. Where a deed embraces tracts in different counties, and is properly recorded in any one of them, it is admissible in evidence as a recorded instrument in the others, as to the tracts there situate. *Hancock v. Tram Lumber Co.*, 65 Tex. 225; *ante*, §56.

² Rev. Stats., §§3153-3163, 4338; *Schleicher v. Markward*, 61 Tex. 99. Indexing the abstract is essential. *Belbaze v. Ratto*, 69 Tex. 636; s. c. 7 S. W. Repr. 501; *ante*, §42.

³ Rev. Stats., §4339; *Thornton v. Murray*, 50 Tex. 161; *Russell v. Farquhar*, 55 Tex. 355.

⁴ Laws 1889, p. 80; *Sayles' Stat.*, add. vol., §167a; *ante*, §44. Where the suit is in a county other than where the land lies, the attachment lien is not valid against subsequent purchasers for value and without notice, and subsequent lien-holders in good faith until notice of the levy is recorded in the county where the land is situate.

⁵ Laws 1889, p. 133; *Sayles' Stat.*, add. vol., §431a. The transcript includes copy of the execution and return of the officer thereon. A certified copy from the county clerk's record is admissible in evidence with like effect as the original judgment and execution.

⁶ Rev. Stats., §4350; *Crews v. Taylor*, 56 Tex. 461; *ante*, §150. The clerk should record deeds without blank spaces left between them on

the record. *Edwards v. Barwise*, 69 Tex. 84; s. c. 6 S. W. Repr. 677. The clerk may record his own deed. *Brockenborough v. Melton*, 55 Tex. 493; *ante*, §148.

⁷ Rev. Stats., §4876; Laws 1887, p. 38; Sayles' Ann. Stats. §548a; *Marsh v. Huyter*, 50 Tex. 243; *Ryan v. Tex. & P. Ry. Co.*, 64 Tex. 242. Probate of a will, as a proceeding *in rem*, charges every one with notice. *Steele v. Renn*, 50 Tex. 468; *ante*, §50; but not where the probate is in another state than where the land lies. *Slayton v. Singleton*, 72 Tex. 209; s. c. 9 S. W. Repr. 876.

Actual notice supplies the want of registry. *Portis v. Hill*, 30 Tex. 529; s. c. 98 Am. Dec. 481; *Littleton v. Giddings*, 47 Tex. 109; *Brother-ton v. Weathersby* (Tex.), 11 S. W. Repr. 505; *Slayton v. Singleton*, 72 Tex. 209; s. c. 9 S. W. Repr. 876; *Link v. Page*, 72 Tex. 592; *Wilson v. Williams*, 25 Tex. 54; *Bonner v. Stephens*, 60 Tex. 616; *Harrison v. Bor-ing*, 41 Tex. 251.

Possession is notice. *Glendenning v. Bell*, 70 Tex. 632; s. c. 8 S. W. Repr. 324; *Evans v. Templeton*, 69 Tex. 375; s. c. 5 Am. St. Rep. 71; 6 S. W. Repr. 843; *Smith v. Miller*, 63 Tex. 72; *Watkins v. Edwards*, 23 Tex. 443; *Wimberly v. Bailey*, 58 Tex. 222; except that of a grantor after the record of a deed of the premises from him. *Eylar v. Eylar*, 60 Tex. 319; *Alstin v. Cundiff*, 52 Tex. 450; *ante*, §§230, 231.

Recitals that suggest inquiry charge notice. *Carter v. Hawkins*, 62 Tex. 393; *Nye v. Moody*, 70 Tex. 434; s. c. 8 S. W. Repr. 606; *Kirk v. Navigation Co.*, 49 Tex. 213; *Webb v. Burney*, 70 Tex. 322; s. c. 7 S. W. Repr. 841; if in the chain of the title: *Holmes v. Buckner*, 67 Tex. 107; s. c. 2 S. W. Repr. 452; *Jenkins v. Adams*, 71 Tex. 1; s. c. 8 S. W. Repr. 603; *ante*, §§158, 163.

Resulting trusts and vendors' liens not within nor affected by the registry laws. *Senter v. Lambeth*, 59 Tex. 256; *McKamey v. Thorpe*, 61 Tex. 648; *Parker v. Coop*, 60 Tex. 111; *Calvert v. Roche*, 59 Tex. 463; *Blankenship v. Douglass*, 26 Tex. 292; s. c. 82 Am. Dec. 608.

§472. Mortgages of Realty.

Deeds of trust and mortgages are recorded in a separate set of books;¹ otherwise they are recorded in the same manner as deeds, and with like effect. They are discharged of record by a release or quit-claim, duly acknowledged and recorded; there being no statutory provision on the subject.²

¹ Rev. Stats., §4304. Assignments of mortgages are to be recorded. *Henderson v. Pilgrim*, 22 Tex. 464.

² *Steffian v. Bank*, 69 Tex. 515; s. c. 6 S. W. Repr. 823; *Perkins v. Sterne*, 23 Tex. 561; s. c. 76 Am. Dec. 72; *Haldeman v. Knight*, *Dallam*, 556; *Breedlove v. Ewing*, 45 Tex. 47; *Byler v. Johnson*, 45 Tex. 509; *Bank v. Ackerman*, 70 Tex. 429; s. c. 8 S. W. Repr. 451; *Turner v. Phelps*, 46 Tex. 251; *Jackson v. Jones*, 11 S. W. Repr. 1061; *Lumpkins v. Adams*, 11 S. W. Repr. 1070.

As to creditors under the recording acts. *Ayres v. Duprey*, 27 Tex. 607; s. c. 86 Am. Dec. 657; *Barrett v. Barrett*, 31 Tex. 344; *Catlin v. Bennett*, 47 Tex. 166; *Stevenson v. Tex. & P. Ry. Co.*, 105 U. S. 703; *Overstreet v. Manning*, 67 Tex. 657; s. c. 4 S. W. Repr. 248.

As to valuable consideration. *Spurlock v. Sullivan*, 36 Tex. 511; *Slator v. Neal*, 64 Tex. 222; *Morton v. Lowell*, 56 Tex. 643; *Beaty v. Whitaker*, 23 Tex. 526; *Evans v. Templeton*, 69 Tex. 375; s. c. 5 Am. St. Rep. 71; *Fletcher v. Ellison*, 1 Tex. Un. Cas. 661; *Case v. Jennings*, 17 Tex. 673; *Huyler v. Dohoney*, 48 Tex. 239; *Fraim v. Frederick*, 32 Tex. 294.

Actual notice to a creditor is effectual. *Glendenning v. Bell*, 70 Tex. 632; s. c. 8 S. W. Repr. 321; *Woodson v. Collins*, 56 Tex. 175; but it must be before his lien is fixed: *Grace v. Wade*, 45 Tex. 522; *Freiberg v. Magale*, 70 Tex. 116; s. c. 7 S. W. Repr. 684; *Ranney v. Hogan*, 1 Tex. Un. Cas. 252.

Purchaser by quit-claim not *bona fide*. *Thorn v. Newsom*, 64 Tex. 161; s. c. 53 Am. Rep. 747; *Fletcher v. Ellison*, 1 Tex. Un. Cas. 66; *Harrison v. Boring*, 44 Tex. 255; *ante*, §§27, 183.

Purchaser from heir protected. *Slayton v. Singleton*, 72 Tex. 209; s. c. 9 S. W. Repr. 876; *Taylor v. Harrison*, 47 Tex. 454; *Holmes v. Johns*, 56 Tex. 52; *Lewis v. Cole*, 60 Tex. 341; *ante*, §184.

Purchaser with actual notice, from one without notice, protected. *Moore v. Curry*, 36 Tex. 668; *ante*, §155.

Purchaser without actual notice of a prior unrecorded deed is protected, though such prior deed be then recorded before his own deed. *Ranney v. Hogan*, 1 Tex. Un. Cas. 257; *ante*, §§13-15, 165-167.

§473. Acknowledgment or proof for record may be made within the state before a clerk of the district court, judge or clerk of the county court or a notary public;

Without the state and within the United States, before a clerk of some court of record having a seal, commissioner of deeds for Texas or a notary public.

In foreign countries, before a minister, commissioner or *chargé d'affaires* of the United States, a consul general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul or consular agent of the United States, or a notary public.¹

The officer must place his certificate on the instrument, with his official seal affixed thereto;² and must certify the identity of the grantor.³ Corporations may convey by deed under the corporate seal, signed by the president or presiding member or trustee, and acknowledged by such officer to be the act of the corporation, or proved in the

manner prescribed for other conveyances.⁴ By statutory suit, or proceeding in court, an imperfect certificate of acknowledgment may be corrected, or an instrument may be proved for record, the judgment in such case being equivalent to a certificate of acknowledgment or proof.⁵

* Rev. Stats., §§4305-4309. A judge in another state is not now authorized to take acknowledgments for Texas. *Talbert v. Dull*, 70 Tex. 675; s. C. 8 S. W. Repr. 530.

Clerks may act by a lawfully authorized deputy. *Wert v. Schneider*, 64 Tex. 327; *Rose v. Newman*, 26 Tex. 131; *ante*, §62. The officer may use abbreviations in stating his title. *McDonald v. Morgan*, 27 Tex. 504; *Blythe v. Houston*, 46 Tex. 67; *ante*, §72. See further as to the officer, *Willis v. Lewis*, 28 Tex. 185; *Brown v. Moore*, 38 Tex. 645; *Wilson v. Simpson*, 68 Tex. 312; s. C. 4 S. W. Repr. 489; *Titus v. Johnson*, 50 Tex. 224; *Peterson v. Lowry*, 48 Tex. 408; *Sample v. Irwin*, 45 Tex. 567.

² Rev. Stats., §§4308, 4311. Official seal must be used. *King v. Russell*, 40 Tex. 124, 130; *Texas Land Co. v. Williams*, 51 Tex. 51; *McKellar v. Peck*, 39 Tex. 381; *ante*, §73; but the recorder need not copy the seal on the record. *Ballard v. Perry*, 28 Tex. 347, 354; *ante*, §74.

Certificate may be attached by mucilage, etc. *Schramm v. Gentry*, 63 Tex. 583; *ante*, §86.

The certificate cannot be aided, or its omissions supplied, by parol. *Coffey v. Hendricks*, 66 Tex. 676; s. C. 2 S. W. Repr. 47; *Titus v. Johnson*, 50 Tex. 224. Material omissions and errors are fatal. *Huff v. Webb*, 64 Tex. 284; *McDonald v. Needham*, 61 Tex. 269; *ante*, §81; but not of formal matters and dates. *Monroe v. Arledge*, 23 Tex. 478; *Webb v. Huff*, 61 Tex. 677; *ante*, §82.

Substantial compliance is sufficient. *Belcher v. Weaver*, 46 Tex. 293; s. C. 26 Am. Rep. 227; *Talbert v. Dull*, 70 Tex. 675; s. C. 8 S. W. Repr. 530; *ante*, §79.

³ Rev. Stats., §4309; *Watkins v. Hall*, 57 Tex. 1; *Schramm v. Gentry*, 63 Tex. 583; *Little v. Wetherford*, 63 Tex. 638; *ante*, §77. Proof of identity need not be indorsed on the certificate. *Sowers v. Peterson*, 59 Tex. 216.

⁴ Rev. Stats., §600; *Muller v. Boone*, 63 Tex. 91; *ante*, §60.

Conveyance by an attorney in fact may be acknowledged in the ordinary form for a deed in the maker's own right. *Giddens v. Byers*, 12 Tex. 75; *ante*, §59; and see *Link v. Page*, 72 Tex. 592; *Hough v. Hill*, 47 Tex. 148.

⁵ Rev. Stats., §§4353-4355; *Pegram v. Owens*, 64 Tex. 475; *Johnson v. Taylor*, 60 Tex. 360; *ante*, §94.

Validating acts. Rev. Stats., §§4356-4358; *Crayton v. Hamilton*, 37 Tex. 269; *Baker v. Westcott*, 11 S. W. Repr. 157; *Butler v. Dunagan*, 19 Tex. 559; *ante*, §97.

§474. Acknowledgment of Married Women.

The wife's ante-nuptial property, and that acquired after marriage by gift, devise or descent, is her separate prop-

erty; but the husband must join in her conveyances of realty.¹ Property acquired by onerous title during the marital relation is community property, and during the coverture is subject to disposal by the husband only, unless it be the homestead, in which case the wife must join in the conveyance.² Estates of dower and curtesy are not recognized. The statute provides for registering a schedule of the wife's separate property.³

A conveyance of or by the wife must be personally acknowledged by her, a separate examination being necessary. The form of joint certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

Before me (name and title of officer) on this day personally appeared....., and....., his wife, known to me (or proven to me on the oath of.....) to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed; and the said....., wife of the said....., having been examined by me privily and apart from her said husband, and having the same fully explained to her, she, the said....., acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this.....day of....., A. D., 18...

[SEAL.]

(Signature and title).⁴

¹ Rev. Stats., §§2851, 559; *Cline v. Upton*, 56 Tex. 319; *Pearce v. Jackson*, 61 Tex. 642; *Ross v. Kornrumpf*, 64 Tex. 390; *Stoker v. Bailey*, 62 Tex. 299; *Dixon v. Sanderson*, 72 Tex. 359; *Dooley v. Montgomery*, 72 Tex. 429; *Morrison v. Clark*, 55 Tex. 437; *ante*, §§114, 186.

² Rev. Stats., §§2852, 560; *Peet v. Commerce Ry. Co.*, 70 Tex. 522; *s. c.* 8 S. W. Repr. 203; *Stevens v. Matthews*, 69 Tex. 340; *s. c.* 6 S. W. Repr. 367; *Tom v. Sayers*, 64 Tex. 339, and cases cited *ante*, §114.

³ Where the title of community property is in the name of the husband only, a purchaser from him, without actual notice of the real status of

the property, will be protected against the claims of the wife and her heirs. *Edwards v. Brown*, 68 Tex. 329; s. c. 4 S. W. Repr. 380; *Hill v. Moore*, 62 Tex. 610.

As to when wife may convey without the husband's joinder, see *Hector v. Knox*, 63 Tex. 613; *Clements v. Ewing*, 71 Tex. 370; s. c. 9 S. W. Repr. 312; *Zimpleman v. Robb*, 53 Tex. 274; *ante*, §118.

³ Rev. Stats., §§4344-4349. No consequence is attached to a failure to register such schedule. *Edrington v. Mayfield*, 5 Tex. 363; *Braden v. Gose*, 57 Tex. 37; *ante*, §185.

⁴ Rev. Stats., §§4310, 4312, 4313; *Clements v. Ewing*, 71 Tex. 370; s. c. 9 S. W. Repr. 312; *Johnson v. Bryan*, 62 Tex. 623; *Belcher v. Weaver*, 46 Tex. 293; s. c. 26 Am. Rep. 267; *Davis v. Agnew*, 67 Tex. 206; s. c. 2 S. W. Repr. 43, 376; *Ruleman v. Pritchett*, 56 Tex. 482; *Berry v. Donley*, 26 Tex. 737; *Coombes v. Thomas*, 57 Tex. 321; *Cole v. Bammel*, 62 Tex. 108; *Langton v. Marshall*, 59 Tex. 296; *Burkett v. Scarborough*, 59 Tex. 496; *Jones v. Goff*, 63 Tex. 255; *Looney v. Adamson*, 48 Tex. 619.

A wife's deed without due certificate of acknowledgment not admissible in evidence as an ancient instrument. *Parker v. Chancellor* (Tex.), 11 S. W. Repr. 503; see *ante*, §95. Privy examination of a widow not necessary. *Beville v. Jones* (Tex.), 11 S. W. Repr. 1128.

The wife may convey by power of attorney. *Patton v. King*, 26 Tex. 685; s. c. 84 Am. Dec. 596; *Warren v. Jones*, 69 Tex. 402; s. c. 6 S. W. Repr. 775; but not by a power made to the husband. *Conner v. Boutwell*, 53 Tex. 627; *Peak v. Brinson*, 71 Tex. 310; s. c. 11 S. W. Repr. 269; *ante*, §117.

§475. Proof by Witnesses.

Proof for record may be made of any conveyance by a subscribing witness. The identity of the witness must be certified as known or as proved. The officer, in taking the proof, is authorized to employ interpreters, issue subpoenas and to punish for contempt.¹ Proof for record may also be made by other witnesses testifying to the hand-writing of the grantor and one subscribing witness, in cases where the grantor and all the subscribing witnesses are dead, non-resident, or their testimony cannot be had.² The statutory certificate of proof by a subscribing witness is as follows:

THE STATE OF..... }
 " COUNTY OF..... }

Before me (name and title of officer) on this day personally appeared....., known to me (or proved to me on the oath of.....) to be the person whose name is subscribed as a witness to the foregoing instrument of writing,

and after being duly sworn by me, stated on oath that he saw....., the grantor, or person who executed the foregoing instrument, subscribe the same (or the grantor or person who executed such instrument of writing acknowledged in his presence that he had executed the same for the purposes and consideration therein expressed), and that he had signed the same as a witness at the request of the grantor (or person who executed the same).

Given under my hand and seal of office this.....day of....., A. D. 18...

[SEAL.]

(Signature and title.)

¹ Rev. Stats., §§4314, 4315, 4321; *Talbert v. Dull*, 70 Tex. 675; s. c. 8 S. W. Repr. 530; *McDaniel v. Needham*, 61 Tex. 269; *Harrick v. Patrick*, 119 U. S. 56; *Hardin v. Sparks*, 70 Tex. 429; s. c. 7 S. W. Repr. 769; *Cavitt v. Archer*, 52 Tex. 166; *Stramler v. Coe*, 15 Tex. 211; *Downs v. Porter*, 54 Tex. 59; *Deen v. Willis*, 21 Tex. 642; *Dorn v. Bert*, 15 Tex. 62.

² Rev. Stats., §§4317-4320; *Waters v. Spofford*, 58 Tex. 115; *Secrest v. Jones*, 21 Tex. 121.

The deed of a married woman cannot be proved by witnesses. *Berry v. Donley*, 26 Tex. 737, 747; *Groesbeck v. Bodman* (Tex.), 11 S. W. Repr. 322.

§476. Chattel Mortgages not accompanied by change of possession, are absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees or lien holders in good faith, unless forthwith filed for record, or a true copy thereof, in the county where the property is then situated, or if the mortgagor be a resident of the state, then in the county in which he resides.¹ A copy can be filed only when the original has been acknowledged.² The instrument is not recorded at length, but is fully indexed in a chattel mortgage record, whereon an entry of satisfaction may also be made by the mortgagee or the clerk.³ A duly certified copy sufficiently proves the fact and time of filing, but no other fact.⁴ If the property be removed to another county, the mortgage must be filed in such other county within four months after the removal.⁵ Conditional sales of personal property reserving title in the

vendor must be registered as chattel mortgages.⁶ Bills of sale of live-stock and marks and brands thereof, are to be recorded;⁷ also agisters' liens upon the dam and progeny of live-stock in certain cases.⁸ Notices of mechanics' liens must be filed in the office of the county clerk by an original contractor within four months, and by a sub-contractor or laborer within thirty days after the indebtedness shall have accrued.⁹

Rev. Stats., *Appendix*, pp. 15, 16; Sayles' Civ. Stats., §3190*b*; Laws 1879, p. 134; *Crow v. Red River Bank*, 52 Tex. 362; *Chaytor v. Brunswick*, 71 Tex. 591; s. c. 10 S. W. Repr. 250; *Keller v. Smalley*, 63 Tex. 512; *Cook v. Halsell*, 65 Tex. 1.

Actual notice of an unfiled chattel mortgage is of no effect as against creditors. *Overstreet v. Manning*, 67 Tex. 637; s. c. 4 S. W. Repr. 248; *ante*, §269. Chattel mortgages are governed by the statute, and a parol lien, unaccompanied by possession, does not affect the property, and hence notice of it would not affect a subsequent incumbrance. *Lazarus v. Henrietta Bank*, 72 Tex. 354.

² Acknowledgment is not required if the original be filed. *Hicks v. Ross*, 71 Tex. 358; s. c. 9 S. W. Repr. 315.

³ Sayles' Civ. Stats., §3190*b*; *Brothers v. Mundell*, 60 Tex. 240. A contract termed upon its face "a chattel mortgage," and registered as such, cannot be shown by parol to be something else. *Wilber v. Kray* (Tex.), 11 S. W. Repr. 540. If of a stock of goods, and the mortgagor remain in possession, continuing to sell, the mortgage is void. *Id.* Sayles' Civ. Stats., §65*r*.

⁴ Sayles' Stats., §3190*b* (3); *ante*, §272. Such copy does not prove the execution of the mortgage. *Boydston v. Morris*, 71 Tex. 697; s. c. 10 S. W. Repr. 331.

⁵ Rev. Stats., §4341; *ante*, §§265, 266.

⁶ Laws 1885, p. 86; Sayles' Civ. Stats., §3190*a*; *Key v. Brown*, 67 Tex. 300; s. c. 3 S. W. Repr. 443; *Lang v. Rickmers*, 70 Tex. 108; s. c. 7 S. W. Repr. 527; *Sinker v. Comparet*, 62 Tex. 470; *ante*, §§249-251.

⁷ Rev. Stats., §§4562-4566; 4628, 4644, *et seq*; *Morrow v. State*, 22 Ct. App. 239. Bill of sale of live-stock on the range does not pass title, even as between the parties, until duly registered. §4564. *Black v. Vaughan*, 70 Tex. 47; s. c. 7 S. W. Repr. 604; *ante*, §189.

⁸ Laws 1889, p. 115; Sayles' Stats., add. vol., §3190*c*. The lien is in favor of the keeper of any stallion, jack or bull, who stands the same for profit. *Id.*

Laws 1889, p. 110; Sayles' Stats., add. vol., §§3164-3179; Rev. Stats., §§3164-3171; *Basset v. Bowers* (Tex.), 12 S. W. Repr. 229; *Lyon v. Ozee*, 66 Tex. 95; *Stuart v. Broome*, 59 Tex. 466; *Odum v. Loomis*, 1 Tex. Civ. App. §524; *Mundine v. Berwin*, 62 Tex. 341; *ante*, §§45, 46. The lien is given by the constitution (art. 16, §37), and when duly filed, relates back and takes precedence over intervening incumbrances. *Keating I. & M. Co. v. Marshall E. L. Co.* (Tex.), 12 S. W. Repr. 489; see *Odum v. Loomis*, *supra*.

UTAH TERRITORY.

§477. Effect of Record.

Conveyances not duly acknowledged and recorded are void as against subsequent purchasers in good faith and for a valuable consideration, when such subsequent purchasers have their deeds first duly recorded. Notice of the contents of the instrument is given to every person from the time it is filed for record. A power of attorney when recorded can be effectually revoked only by having the revocation also recorded.¹ A duly recorded instrument, or certified copy thereof where the absence of the original is accounted for, may be read in evidence as sufficient *prima facie* proof of execution.²

¹ Comp. Laws 1876, §§617-619; Laws 1867, ch. 28; Wells v. Smith, 2 Utah, 39.

Actual notice supplies want of registry. Marier v. Lee, 2 Utah, 460.

Possession by a polygamous wife held not notice. Townsend v. Hooper, 2 Utah, 548; Townsend v. Little, 109 U. S. 509.

² Comp. Laws, §§624, 625. Conveyances are ineffectual unless attested by one witness. §617. Tarpey v. Desert Salt Co. (Utah), 14 Pac. Repr. 338. A scroll will suffice for a seal.

§478. Mortgages, Real and Chattel.

Mortgages of realty are recorded as other conveyances and with like effect.¹ A mortgage of real property, whatever its terms, is not to be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure or sale under a power.² Mortgages are discharged by an entry in the margin of the record, or by a separate instrument of release duly executed and recorded.³ Chattel mortgages are not good against third parties, unless possession is delivered to and retained by the mortgagee, or the mortgage provides that the mortgagor may retain possession, and unless accompanied by an affidavit of the parties of the good faith of the parties, and that it is not intended to hinder or delay the creditors of the mortgagor. They must be acknowledged by the grantor and attested by one witness, and, together with the affidavit, be filed for record in the county

in which the mortgagor resides. The record is good for one year from the date of the mortgage, but only ninety days after the debt is due. Chattel mortgages cannot include property exempt from execution, except for the purchase money thereof. They are foreclosed and discharged of record in the same manner as mortgages of real property. This act shall not apply to contracts made by any railway company owning or operating a railway in this territory, for the possession, use and conditional purchase of rolling stock, etc., to operate the same, and containing the condition that the title shall not pass until full payment of the purchase price; and such contracts shall be valid as to all persons without recording the same.⁴

¹ Comp. Laws, §618; *Singer v. Chalmers*, 2 Utah, 542; *Wells v. Smith*, 2 Utah, 39.

² Code Civ. Proc. 1884, §626.

³ Laws 1884, ch. 42; Comp. Stats., §§648, 649.

⁴ Laws 1884, ch. 21; §§1-9; Laws 1886, ch. 39, §13. The penalty for selling mortgaged property without the written consent of the mortgagee, his legal representatives or assigns, is a fine not exceeding three times the value of the property, or imprisonment in the county jail not more than six months, or both, at the discretion of the court.

§479. Acknowledgment may be made within the territory before a judge or clerk of a court having a seal, or a notary or county recorder, or a justice of the peace of the county where the real estate is situated. ♦

Without the territory and within the United States, before a judge or clerk of a United States court, or by a judge or clerk of a court of record of a state or territory, or by a notary, or by a commissioner of deeds for Utah.

In foreign countries, before a judge or clerk of a court having a seal, or a notary, or a minister, commissioner or consul of the United States appointed to reside in the country where the deed is executed.¹

An officer authorized to take acknowledgments or proof may act by a lawfully appointed deputy. The identity of the grantor must be certified as known or proved to the

officer. It is not necessary for the husband to join with the wife in a conveyance of her real estate.² A married woman may convey as if *sole*, and a separate examination is not necessary. The certificate of joint acknowledgment may be as follows:

STATE OR TERRITORY OF }
COUNTY OF..... }

On this.....day of....., A. D., 18..., before me (name and title of officer), in and for said county, personally appeared A. B., and C. B., his wife, personally known to me (or satisfactorily proven to me on the oath of..... a competent and credible witness, for that purpose by me duly sworn) to be the same persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.]

(Signature and title.)³

¹ Comp. Laws, §§214-221, 632.

² Code Civ. Proc., §569 *et seq.* All property owned by either spouse before marriage, and that acquired afterwards by gift, bequest, devise, descent or purchase, is the separate property of such spouse. §569.

³ Comp. Laws, §§636, 637. The certificate is not conclusive. Comp. Laws, p. 255, §9; Tarpey v. Desert Salt Co. (Utah), 14 Pac. Repr. 338.

§480. Proof by Witnesses.

A deed requires at least one attesting witness, and unless so witnessed it is not effectual to convey title.¹ Proof for record may be made by a subscribing witness. The form of certificate in such case may be as follows:

STATE OR TERRITORY OF..... }
COUNTY OF..... }

On this.....day of....., A. D. 18..., before me (name and title of officer), in and for said county, personally appeared C. D., personally known to me (or satisfactorily proved to me by the oath of E. F., a competent and

credible witness, for that purpose by me duly sworn) to be the same person whose name is subscribed to the annexed instrument as a witness thereto, who being by me duly sworn deposes and says that he resides in....., county of....., and (state) or territory of....., that he was present and saw G. H., personally known to him to be the same person described in and who executed the annexed instrument as a party thereto, sign, seal and deliver the same, and heard him acknowledge that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned, and that he, the deponent, thereupon signed his name as a subscribing witness thereto at the request of the said G. H.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.]

(Signature and title.)

¹ Comp. Laws, §617. *Tarpey v. Desert Salt Co.* (Utah), 14 Pac. Repr. 338.

Claims for mechanics' liens verified by affidavit, must be filed with the county recorder by an original contractor within ten days after the completion of his contract, and by others within thirty days after the completion of the building or work. The lien is not preserved unless suit to foreclose it is brought within ninety days after the filing, or after the credit expires. Code Civ. Proc., §§1057-1066.

VERMONT.

§481. Effect of Record.

A deed is not effectual in law to hold the land conveyed against any person but the grantor and his heirs, unless it is acknowledged and recorded as provided by statute. A deed made under a power of attorney has no effect and is not admissible in evidence, unless such power of attorney is signed, sealed, attested and acknowledged and recorded in the office where the deed is required to be recorded.¹ Deeds require a seal, a scroll not being sufficient, and the attestation of two subscribing witnesses. Wills must be recorded in the probate court, and also in the town clerk's office in every town containing real estate upon which they operate.²

¹ Rev. Laws Vermont 1880, §§1931, 1935; *Hart v. Farmer's Bank*, 33 Vt. 252; *Johnson v. Borden*, 40 Vt. 567; s. c. 94 Am. Dec. 486; *Smith v. South Royalton Bank*, 32 Vt. 341; s. c. 76 Am. Dec. 139; *Pratt v. Bank of Bennington*, 10 Vt. 293; s. c. 33 Am. Dec. 201; *Day v. Clark*, 25 Vt. 397; *Sprague v. Rockwell*, 51 Vt. 401; *Oatman v. Fowler*, 43 Vt. 462; *Holley v. Hawley*, 39 Vt. 525; s. c. 94 Am. Dec. 350; *Perrin v. Reed*, 35 Vt. 2; *Stevens v. Brown*, 3 Vt. 420; *Sanger v. Craigie*, 10 Vt. 555; *Ferris v. Smith*, 24 Vt. 27; *Potter v. Dooley*, 55 Vt. 512; *Leach v. Beattie*, 33 Vt. 195; *Jarvis v. Aiken*, 25 Vt. 635; *Passumsic v. Nat. Bank*, 53 Vt. 82.

² Actual notice supplies want of registry. *Ellison v. Wilson*, 36 Vt. 67; *Miller v. Bingham*, 29 Vt. 82; *Stevens v. Goodenough*, 26 Vt. 676; *Morrill v. Morrill*, 53 Vt. 74; *Corliss v. Corliss*, 8 Vt. 475; *Stafford v. Ballou*, 17 Vt. 329; *Brackett v. Wait*, 6 Vt. 411; *Blaisdell v. Stevens*, 16 Vt. 179.

Possession is notice. *Wright v. Bates*, 13 Vt. 341; *Wing v. Hall*, 47 Vt. 182.

As to filing and indexing the record. *Johnson v. Borden*, 40 Vt. 567; s. c. 94 Am. Dec. 436; *Sawyer v. Adams*, 8 Vt. 172; *Barrett v. Prentiss*, 57 Vt. 297.

§482. Mortgages of Realty are recorded as other conveyances and with like effect. They may be discharged of record by an entry on the margin of the record signed by the mortgagee, his representative or assignee; or by such entry on the mortgage deed, signed, sealed and witnessed, and afterwards noted in the margin of the record by the clerk. The wife is not required to join in the discharge

of a mortgage. Neglect for ten days after request to make a proper discharge or to execute a deed of release, renders the party liable for all actual damages occasioned thereby.¹

¹ Rev. Laws, §§1950-1952; *Giffin v. Barr*, 60 Vt. 599; *Seymour v. Darrow*, 31 Vt. 122; *Stafford v. Ballou*, 17 Vt. 329; *Ladd v. Campbell*, 56 Vt. 529; *Palmer v. Palmer*, 48 Vt. 69.

The discharge may also be in the common form of a separate release. §1952. As to creditors, see *Hackett v. Callender*, 32 Vt. 97.

483. Acknowledgment may be made within the state before a justice of the peace, notary public or master in chancery.

Without the state, before a justice of the peace, notary public or commissioner for Vermont, or any other officer by the laws of such state authorized to take acknowledgment of deeds.

The husband must join in conveyances of the wife's separate property; but it is not necessary for her to join in his conveyances in order to bar her dower.

Separate acknowledgment or private examination of the wife is not required. The form of joint certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

At....., this.....day of....., 18..., personally appeared....., and....., his wife, the signers and sealers of the above written instrument, and acknowledged the same to be their free act and deed.

(Signature and title.)¹

¹ Rev. Laws, §§1927, 1946; *Wood v. Cochrane*, 39 Vt. 544; *Brooks v. Chaplin*, 3 Vt. 281; s. c. 23 Am. Dec. 209; *McDaniel v. Flower Brook*, 22 Vt. 274; *Middlebury College v. Cheney*, 1 Vt. 336; *Perrin v. Reed*, 35 Vt. 2; *Johnson v. Borden*, 40 Vt. 567; s. c. 94 Am. Dec. 436; *Pope v. Henry*, 24 Vt. 560; *Bogue v. Bigelow*, 29 Vt. 179; *Chandler v. Spear*, 22 Vt. 388.

A sheriff's deed is not effectual without acknowledgment. *Clarke vs. Tucker*, 6 Vt. 81; *Pratt v. Battels*, 28 Vt. 685. As to damages against the clerk, see *Giffin v. Barr*, 60 Vt. 599.

§484. Proof by Witnesses.

The statute requires that conveyances have two subscribing witnesses; and without them the record is ineffectual.¹ In certain cases proof for record may be made by the subscribing witnesses before a judge or court in the State of Vermont.² Where the grantor refuses to acknowledge, the statute authorizes process by a justice of the peace to compel acknowledgment.³

¹ Rev. Laws, §1945; *Morrill v. Morrill*, 60 Vt. 74. The witness must have no certain legal interest in the property. *Tillotson v. Pritchard*, 60 Vt. 94; *Day v. Adams*, 45 Vt. 510.

² Rev. Laws, §§1938-1940.

Rev. Laws, §§1947-1949.

§484a. Chattel Mortgages not accompanied with possession of the property must be recorded in the office of the clerk of the town in which the mortgagor resides at the time of making the mortgage, or if he resides out of the state, in the town in which the property is situated. An affidavit by the mortgagor and the mortgagee as to the *bona fides* of the debt is required. Without record and such affidavit, chattel mortgages are not valid against any person except the mortgagor, his executors and administrators.¹ When a corporation is a party to the mortgage, the affidavit required may be made and subscribed by any director, cashier or treasurer thereof, or by any person authorized on the part of such corporation to make or receive such mortgage; when made by or to a firm, one partner may make the required affidavit; when taken by an agent or attorney of the mortgagee, in the absence of the mortgagee, such agent or attorney may sign and swear to the affidavit instead of the mortgagee. If the mortgage is given to indemnify the mortgagee against liability assumed, or to secure the fulfillment of any agreement other than the payment of a debt due from the mortgagor to the mortgagee, such liability or agreement shall be stated truly and specifically in the condition of the mortgage, and the statutory form of affidavit shall be so far varied as to verify the validity, truth and justice of such liability or agreement.

Chattel mortgages may be discharged in the same manner as mortgages of real estate. If, after condition broken, there be a foreclosure through a sale made by a public officer, such officer makes a return of his doings on such sale, which is to be filed and recorded in the town clerk's office, where the mortgage is recorded, and operates as a discharge of the mortgage.

The statute requires registry of conditional sales of personal property as against creditors of and purchasers from the conditional vendee, the registry to be made within thirty days from the delivery of the property; and provides also that a creditor of such vendee may, by attachment, take his place in relation to the property, and extinguish the right of the vendor to it by making payment of the amount remaining due. The lien of the vendor may be discharged by an entry on the margin of the record, or on the instrument creating the lien, or by a separate release.²

¹ Laws 1878, pp. 58, 59; *Courtis v. Crane*, 32 Vt. 232; *Woodward v. Gates*, 9 Vt. 358; *Skiff v. Solace*, 23 Vt. 27; *Russell v. Fillmore*, 15 Vt. 130; *Barker v. Richardson*, 57 Vt. 408.

The affidavit must be in substance as follows: "We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the conditions thereof, and for no other purpose whatever, and that the same is a just debt, honestly due and owing from the mortgagor." See *Gilbert v. Vail*, 60 Vt. 261; s. c. 14 Atl. Repr. 542; *ante*, §271.

The mortgagor is forbidden to execute any second or subsequent mortgage of personal property while the same is subject to a previously existing mortgage or mortgages given by such mortgagor, unless the fact of the existence of such previous mortgage or mortgages be set forth in the subsequent mortgage. A violation of this provision, or a sale or pledge of the property without the consent of the mortgagee in writing upon the back of the mortgage and on the margin of the record thereof, subjects the mortgagor to liability to a fine of double the value of the property.

² Rev. Laws, §1186, 1992; Laws 1886, p. 63; *Kelsey v. Kendall*, 48 Vt. 24; *Phelps v. Hubbard*, 51 Vt. 489; *Duncan v. Stone*, 45 Vt. 123; *Fales v. Roberts*, 38 Vt. 503; *Touner v. Bliss*, 51 Vt. 59; *Whitcomb v. Woodworth*, 54 Vt. 544; *Bugbee v. Stevens*, 53 Vt. 389; Laws 1884, pp. 95, 96.

A claim of mechanic's lien for work or materials in erecting, repairing, altering or removing buildings must be recorded in the town clerk's office of the town where the property is situated, and must be followed by an action on the claim within three months after filing the memorandum, if the debt is then due, or within three months after the debt becomes due, if not due when the memorandum is filed. Rev. Laws, §1983.

VIRGINIA.

§485. Effect of Record.

Conveyances, contracts, trust deeds and mortgages of real estate or goods and chattels shall be void as to creditors and subsequent purchasers, for valuable consideration without notice, until and except from the time they are duly admitted to record in the counties where the property is situate. Excepting deeds of trust and mortgages, conveyances are, if recorded within twenty days, valid and effectual as recorded instruments from the day of acknowledgment.¹ Creditors and purchasers are defined by the statute to include not only creditors of and purchasers from the grantor, but also all creditors and purchasers who but for the deed or writing would have title to the property conveyed or a right to subject it to their debts.² Of two instruments executed on the same day, the first recorded has preference.³ The vendor's equitable lien is abolished, except where expressly reserved in the deed.⁴ Executory contracts affecting real estate and not in writing are declared void both at law and equity as to purchasers for value without notice and creditors, but if in writing and recorded, their record is effectual as that of other conveyances.⁵ *A lis pendens* record is kept by the recorder, and suits filed are not notice to third parties until a proper memorandum thereof is recorded.⁶ A power of attorney may be recorded in any county, and where the original of a recorded instrument has been lost, a certified copy thereof may be recorded in another county.⁷

¹ Code of Va. 1887, §§2464-2467; *Smith v. Proffatt*, 83 Va. 832; *First Nat. Bank of Harrisonburg v. Paul*, 75 Va. 594; s. c. 40 Am. Rep. 740; *Horton v. Bond*, 28 Gratt. 815; *Herman v. Oberdorfer*, 33 Gratt. 497; *Raines v. Walker*, 77 Va. 92; *Armentrout v. Gibbons*, 30 Gratt. 632; *Tompkins v. Powell*, 6 Leigh. 576; *Mundy v. Vawter*, 3 Gratt. 518; *Yancey v. Mauck*, 15 Gratt. 300; *Pollard v. Lively*, 2 Gratt. 216; *Doswell v. Buchanan*, 3 Leigh. 365; s. c. 23 Am. Dec. 280.

² Code. §2472; *Wickham v. Lewis*, 13 Gratt. 427. See as to rights of creditors under the recording acts, and that they cannot be affected by actual notice: *Doswell v. Buchanan*, *supra*; *Briscoe v. Ashby*, 24 Gratt. 454; *Lamar v. Hall*, 79 Va. 147; *Gregg v. Sloan*, 76 Va. 497; *Young v. Devries*, 31 Gratt. 304; *Moore v. Holcombe*, 3 Leigh. 397; *Ballow v.*

Hudson, 13 Gratt. 672; Floyd v. Harding, 28 Gratt. 401; Dobyys v. Waring, 82 Va. 159; Cowardin v. Anderson, 78 Va. 88; Gray v. Moseley, 2 Munt. 545; Guerrant v. Anderson, 4 Rand. 208; Marsh v. Chambers, 30 Gratt. 299; Eidson v. Huff, 29 Gratt. 338; Sinclair v. Sinclair, 79 Va. 40; Withers v. Carter, 4 Gratt. 407.

³ Code, §2469. Except as against creditors, actual notice supplies the want of registry. Effinger v. Hall, 81 Va. 94; Smith v. Proffatt, 82 Va. 832; s. c. 1 S. E. Repr. 67; Vest v. Michie, 31 Gratt. 149; s. c. 31 Am. Rep. 722; B. & O. Ry. Co. v. McKinzie, 81 Va. 71; Wood v. Krebbs, 30 Gratt. 708; Newman v. Chapman, 2 Rand. 93; s. c. 14 Am. Dec. 766; Long v. Weller's Executors, 29 Gratt. 347; McClure v. Thistle, 2 Gratt. 182; Morgan v. Fisher, 82 Va. 417.

⁴ Code, §2474; Gordon v. Rixley, 76 Va. 694, 700; 81 Va. 451.

⁵ Code, §§2463, 2464. Possession is notice. Preston v. Nash, 76 Va. 1; Ransone v. Frayser, 10 Leigh, 592; Floyd v. Harding, 28 Gratt. 401, 410.

⁶ Code, §3566; Code 1860, ch. 186; §5; Briscoe v. Ashby, 24 Gratt. 471; Cirode v. Buchanan, 22 Gratt. 205; 75 Va. 274, 715; 30 Gratt. 260; 5 Gratt. 259; 9 Leigh, 293; 5 Leigh, 263; 2 Rand. 93.

⁷ Code, §§2499, 2503; Code 1873, ch. 117, §§1, 9. Deeds not acknowledged may be recorded for preservation. §11.

§486. Mortgages, Real and Chattel.

Deeds of trust and mortgages are recorded as other conveyances and with like effect,¹ except that conveyances affecting personal estate shall be recorded in the clerk's office of the corporation or hustings court, and each of such courts, where the property, or any part thereof, is situated.² If the property be removed, the instrument must, within one year after such removal, be⁴ recorded in the county or corporation to which the property is so removed.³

Every sale or contract for the sale of goods or chattels, wherein the title is reserved until the same be paid for in whole or in part, or the transfer of the title is made to depend on any condition, and possession be delivered to the vendee, is void as to creditors of and purchasers for value without notice from such vendee, unless such sale or contract be evidenced by writing executed by the vendor, in which the reservation or condition is expressed, and until and except from the time the said writing is duly admitted to record in the county or corporation in which the goods or chattels may be. Contracts concerning the rolling stock,

cars, etc., of railroad companies are to be recorded in the county or corporation court of the county or corporation where the principal office of the company is located; if in Richmond City, in the Richmond chancery court; and each locomotive, car, or other piece of rolling stock, is to be plainly and permanently marked with the name of the vendor on both sides thereof, followed by the word "owner."¹

¹ Code 1887, §§2464-2467; Zollman v. Moore, 21 Gratt. 313; Wickham v. Lewis, 13 Gratt. 427; Summers v. Darne, 31 Gratt. 791; Bird v. Wilkinson, 4 Leigh, 266; Doswell v. Buchanan, 3 Leigh, 365; s. c. 23 Am. Dec. 280.

² Code, §2468; Addington v. Etheridge, 12 Gratt. 436; McComb v. Donald, 82 Va. 903.

³ Code, §2468; Lane v. Mason, 5 Leigh, 320; *ante*, §§265, 266. Married women, infants and insane persons are allowed one year after the removal of disability.

Assignments of mortgages and transfers of choses in action are not entitled to record. Gordon v. Rixley, 76 Va. 694, 701; Dailey v. Warren, 80 Va. 512; Kirkland v. Brune, 31 Gratt. 136.

⁴ Code, §2462; McComb v. Donald, 82 Va. 903.

§487. Acknowledgment or proof may be made within the state before a clerk of any circuit, county or corporation court.

Without the state and within the United States, before a justice, commissioner in chancery, notary public, or commissioner of deeds for Virginia, or clerk of court.

In foreign countries, before a minister plenipotentiary, *chargé d'affaires*, consul-general, consul, vice-consul or commercial agent, appointed by the government of the United States to any foreign country, or the proper officer of any court of such country, or the mayor or other chief magistrate of any city, town or corporation therein. The certificate of single acknowledgment may be as follows:

STATE OF }
COUNTY OF }

I (name and title of officer), of the county of ,
in the State of , do certify that E. F., whose
name is signed to the writing above, bearing date on the

.....day of....., 18.., has acknowledged the same before me in my county aforesaid.

Given under my hand this.....day of....., 18...

(Signature and title.)¹

¹ Code 1887. §2501; Acts 1888, p. 425; Davis v. Beasley, 75 Va. 494; Horsely v. Garth, 2 Gratt. 471; s. c. 44 Am. Dec. 393; Shanks v. Lancaster, 5 Gratt. 110; Welles v. Cole, 6 Gratt. 645; Raines v. Walker, 77 Va. 92; Griffin v. Cunningham, 20 Gratt. 31; Harrisonburg Bank v. Paul, 75 Va. 594; Hassler v. King, 9 Gratt. 115; Harkins v. Forsythe, 11 Leigh, 294.

The delivery of a deed is presumed to have been at the date of the acknowledgment rather than at the date of the instrument. Hardy v. Norfolk, 80 Va. 404; Raines v. Walker, 77 Va. 92; Harmon v. Oberdorfer, 33 Gratt. 497.

An ancient deed admissible in evidence without acknowledgment or proof. Caruthers v. Eldredge, 12 Gratt. 670.

There is no special provision as to deeds of corporations. The recording officers are the clerks of the county and corporation courts, and of the chancery court in the city of Richmond.

§488. Acknowledgment of Married Women.

Property owned by the wife at the time of marriage, and that acquired by her afterwards in any manner, is her separate estate, and may be conveyed by her without the joinder of the husband in the conveyance.¹ As to other property, and in order to bar her right of dower, the conveyance must be executed by both husband and wife, and admitted to record as to the husband as well as the wife.² A married woman who is a non-resident of Virginia, is authorized to convey by power of attorney, executed and acknowledged by the husband as well as herself.³ Separate examination is not now required in the wife's acknowledgment, which may be taken by the officers above mentioned. Until the Code of 1887, privy examination was necessary, and the form of the certificate of separate acknowledgment was as follows:

STATE OF..... }
COUNTY OF }

I (name and title of officer), do hereby certify, that , the wife of..... , whose name is signed

to the writing above (or hereunto annexed), bearing date on the.....day of....., 18..., personally appeared before me in the county and state aforesaid, and being examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said....., acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand this.....day of....., 18...

(Signature and title.)⁴

¹ Code 1887, §§2284, 2503.

² Code, §2502; Code 1873, ch. 117, §7. Title held not to pass until the deed, duly acknowledged by both husband and wife, has been recorded. *Rohrer v. Roanoke Bank*, 83 Va. 589; s. c. 4 S. E. Repr. 720; *Sewall v. Haymaker*, 127 U. S. 719; 8 Sup. Ct. Repr. 1348.

³ Code, §2509. The power may be legally recorded in any county.

⁴ Code, §§2501-2504; Code 1873, ch. 117, §4; *First Nat. Bank v. Paul*, 75 Va. 594; s. c. 40 Am. Rep. 740; *Bolling v. Teel*, 76 Va. 487; *Grove v. Zumbro*, 14 Gratt. 501; *Harvey v. Peck*, 1 Mumf. 518; *Hairston v. Randolph*, 12 Leigh, 445; *Harkins v. Forsythe*, 11 Leigh, 294.

A claim of mechanic's lien must be filed for record with the clerk authorized to record deeds within thirty days after the building or structure is completed, or the work thereon otherwise terminated. The claim must be verified by affidavit, and is to be recorded in a separate record book, and indexed in the name both of the lien claimant and of the owner of the property. Mere inaccuracy in the account filed, or in the description of the property, will not invalidate the lien, if the property can be reasonably identified by the description given. Code 1887, §§2474-2478.

WASHINGTON.

§489. Effect of Record.

All conveyances of real estate, or any interest therein, shall be by deed. Deeds and mortgages are recorded in the office of the auditor of the county where the land is situated, and are valid as against *bona fide* purchasers from the date of the filing of them for record. The record is notice to all the world.¹ A deed must be in writing, signed by the party bound thereby, and acknowledged, by the party making it, before an officer.²

¹ Rev. Code 1881, §2314; Laws 1887-8, p. 50; Laws 1877, p. 312. In order that a judgment be a lien upon the real estate of the judgment debtor, a transcript of the judgment must be filed in the office of the auditor of the county in which the land is situated. The lien will then be good for five years. Rev. Code, §321.

² Rev. Code, §2312; Laws 1887-8, p. 50. A conveyance of lands in payment of a wager at cards, dice or other gambling device, is void. §1254.

The use of private seals to the signature of grantors is hereby abolished, and no private seals shall be necessary to the validity of any deed of real estate in this state. Laws 1887-8, p. 50.

§490. Mortgages, Real and Chattel.

Mortgages of realty are recorded as other conveyances and with like effect. Chattel mortgages are void as against creditors of the mortgagor, or subsequent purchasers and incumbrancers of the property for value and in good faith, unless they be accompanied by an affidavit by the mortgagor that the mortgage is made in good faith, and without design to hinder, delay or defraud creditors, and be acknowledged and recorded in the county in which the property is situated, in a book kept exclusively for that purpose. They are then binding until six years after the debt becomes due.¹ Mortgages are discharged of record by an entry in the margin of the record by the mortgagee, or his legal representative, or by a certificate duly acknowledged and recorded. The wife must join in a mortgage of property exempt from execution.²

Every person performing labor upon saw-logs, spars, timber or lumber has a lien thereon for his wages; and the

owner of land upon which he permits others to cut timber, has a lien for the value thereof upon the manufactured timber. A person claiming the benefit of such lien must file a notice of lien for record in the office of the county auditor within thirty days from the time the lien accrued, and commence proceedings to enforce the lien within twelve months thereafter.³

A farm laborer has a lien on the crop raised for the payment of his wages; a landlord has a lien upon crops grown on the demised premises for that year, the laborer's lien having preference over that of the landlord. The liens must be filed within forty days after close of the labor, or expiration of the yearly lease. Mechanics' liens must be filed within ninety days after labor done or materials furnished, or after the performance of any labor in a mine or mining claim.⁴

¹ Code, §27; Laws 1879. pp. 104, 105; *De St. Germain v. Wind*, 3 Wash.189; s. c. 13 Pac. Repr. 753; *Marsh v. Wade*, 20 Pac. Repr. 578; Laws 1885-6, p. 117.

The mortgaged property may be taken into possession by the mortgagee when the debt secured by the mortgage is due; or if not due, whenever he has reasonable ground to believe that by leaving the property in possession of the mortgagor he will be in danger of losing the debt, or the security; and he may have the property sold by the sheriff of the county to satisfy the debt.

² Laws 1887-8, p. 162.

³ Code, §§1940-1950.

⁴ Code, §§1975-1977; Laws 1887-8, pp. 130, 131.

§491. Acknowledgment may be made within the state before a judge of the supreme court, judge of the probate court, justice of the peace, county auditor, a clerk of the district or supreme court or their deputies, or a notary public.

Without the state and within the United States, before any person authorized to take acknowledgments of deeds by the laws of the state or territory wherein the acknowledgment is taken, or before any commissioner of deeds for Washington. Unless taken before a

clerk of a court of record of said state, or by an officer having a seal of office, there must be attached a certificate of a clerk of a court of record for the county or district, under the seal of said court, that the person making the certificate of acknowledgment was at the date thereof such officer as he therein represents himself to be, authorized by law to take the acknowledgment of deeds, and that he verily believes the signature of the officer to be genuine.

In foreign countries, before any minister plenipotentiary, secretary of legation, *chargé d'affaires*, consul-general, vice-consul, or commercial agent appointed by the government of the United States to the country where it is taken, or before the mayor or chief magistrate of any city or town therein.¹

¹ Rev. Code, §§2315-2319; Laws 1887-8, p. 2. The record imparts notice without acknowledgment, but unless acknowledged, the instrument cannot be read in evidence as a recorded instrument without proof of execution. §2323.

§492. Acknowledgment of Married Women.

The husband and wife must join in conveyances of real estate which is community property, or the separate property of the wife.¹ In conveying the homestead, the wife must sign the conveyance out of the presence of the husband, and the officer taking the acknowledgment must certify that he made known to her at the time of signing and acknowledging the conveyance that she was conveying away her homestead, and that she signed and acknowledged the conveyance out of the presence of her husband.² It shall not be necessary to take the acknowledgment of the wife separate and apart from the husband, except as to mortgages of the homestead, as provided by the laws of Washington.* A certificate of acknowledgment, substantially in the following form, shall be sufficient:

(*) The code of 1881, §§344, 2313, provides for a separate examination of the wife in conveying the homestead. Laws of 1886-7, pp. 179, 180, seem to limit the separate examination of the wife to mortgaging the homestead.

STATE OF WASHINGTON.... }
 COUNTY OF..... }

I (here give name of officer and official title), do hereby certify that on this.....day of....., 18.., personally appeared before me (name of grantor, and if acknowledged by wife, her name, and add "his wife"), to me known to be the individual (or individuals) described in and who executed the within instrument, and acknowledged that he (she or they) signed and sealed the same as (his, her or their) free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this.....day of
, A. D. 18...

[SEAL.]

(Signature of officer.)

In the case of a conveyance of the homestead, the certificate, after reciting that the officer made known to the wife the contents of the instrument, should state further, "and did fully apprise her of her rights of homestead under the laws of Washington, and of the effect of signing the said instrument, and she thereupon, then and there, signed said instrument, and acknowledged to me that she executed the same voluntarily, of her own free will, and without any fear or coercion from her husband."³

¹ Rev. Code, §2313. Property owned by either spouse at the time of marriage, and that acquired afterwards by gift, devise or descent, is separate property; other property is community property, of which the husband has control, but which he cannot convey, if real estate, without the joinder of the wife. §§2400-2410.

² Rev. Code, §344. As to the wife's deed of community property, see *Lemon v. Waterman*, 2 Wash. 485; s. c. 7 Pac. Repr. 899; *Andrews v. Andrews*, 3 Wash. 286; s. c. 14 Pac. Repr. 68.

³ Rev. Code, §§2313, 344; Laws 1885-6, pp. 179, 180; Laws 1887-8, p. 162. Where the acknowledgment is before a justice of the peace, no official seal is necessary to the certificate.

Either husband or wife may make a power of attorney to the other for the sale of community property, or to a third person. Laws 1887-8, p. 53.

WEST VIRGINIA.

§494. Effect of Record.

Conveyances, deeds of trust and mortgages are void as to creditors and subsequent purchasers for a valuable consideration without notice, until and except from the time they are duly admitted to record in the county where the property is situated. If two or more writings embracing the same property are admitted to record in the same county on the same day, that which was first admitted to record has priority.¹

Creditors and purchasers are defined by the statute to include not only creditors of and purchasers from the grantor, but also all creditors and purchasers who, but for the deed or writing, would have title to the property conveyed, or a right to subject it to their debts.² A purchaser is not affected by record of a deed or contract made by a person under whom his own title is not derived, nor by such record made by any person before the date of a deed or contract made to or with such person, duly recorded, and from which his title is derived.³ A certified copy of a recorded instrument, where the original has been lost, may be recorded in another county, and plats, schedules, etc., attached to a deed, are to be recorded with it.⁴

¹ Code 1887, ch. 74, §§4-8; Rev. Stats., Kelly, 1878, ch. 96, §§5, 6, 8; Code 1870, ch. 74, §§5, 8; Warren v. Syme, 7 W. Va. 474; Pickens v. Knisely, 29 W. Va. 1; S. C. 6 Am. St. Rep. 622; Warren v. Branch, 15 W. Va. 21.

Actual notice, except as to creditors, supplies want of registry. Cain v. Cox, 22 W. Va. 594.

² Code, ch. 74, §9; Kelly's Rev. Stats., ch. 96, §9. Creditor's rights under the recording statute: Cox v. Wayt, 26 W. Va. 807; Bank v. Neal, 28 W. Va. 744; Anderson v. Nagle, 12 W. Va. 98; Renick v. Ludington, 14 W. Va. 367.

³ Code, ch. 74, §10; Kelly's Rev. Stats., ch. 96, §10. Possession is notice. Davis v. Demming, 12 W. Va. 246, 262; Western Co. v. Peytona, 8 W. Va. 406; Lawrence v. Dubois, 16 W. Va. 443.

⁴ Code, ch. 73, §§8-10; Kelly's Rev. Stats., ch. 65, §§7, 8. Deeds are required to be under seal of the grantor, but a scroll or printed device will answer for a seal. The clerk of the county court is the recorder of conveyances.

The place of record is the county wherein the property is situate, but a power of attorney may be recorded in any county. Code, ch. 73, §§1, 2; Kelly's Rev. Stats., ch. 65, §1.

§495. Mortgages, Real and Chattel.

Mortgages of realty are recorded as other conveyances and with like effect. The wife should join in mortgages and deeds of trust, as otherwise she will not be barred of dower, except where they are given to secure purchase money. They are released of record by writing signed and acknowledged by the person entitled to the benefit of the lien, and recorded in the proper county, with an entry by the recorder on the margin of the record of the lien. In case of refusal to execute a release, the circuit court may direct the recorder to execute such release.¹ Chattel mortgages and deeds of trust are recorded with like effect as other conveyances in the counties wherein the property, or any part thereof, is situated. If the property be removed to a different county, the mortgage must, within three months after such removal, be again recorded in such other county.²

¹ Code 1887, ch. 74, §§4, 5; ch. 76, §2; Code 1870, ch. 76. The statute provides that the release may be in form or effect as follows:

"I, A. B., hereby release a mortgage (or deed of trust) made by C. D. to me (or to E. F., my trustee, or to....., and assigned to me), dated the.....day of....., 18.., and recorded in the office of the clerk of the county court of.....county, West Virginia, in deed book....., page.....

(Signed.) A. B.

Acknowledged before the subscriber, this.....day of....., 18..
G. H., Justice (or Notary Public, etc., as the case may be)."

Code, ch. 74, §7; Kelly's Rev. Stats., ch. 93, §7; Code 1870, ch. 74, §§5-8; McGinnis v. Savage, 29 W. Va. 362; s. C. 1 S. E. Repr. 746.

§496. Acknowledgment may be made within the state before a clerk of the county court.

Without the state and within the United States, before a justice, notary public, clerk of a county court, prothonotary, clerk of any court within the United States, or commissioner of deeds for West Virginia.

In foreign countries, before a minister plenipotentiary, *chargé d'affaires*, consul-general, consul, vice-consul, or commercial agent of the United States, or the proper officer

of any court of such country, or the mayor or other chief magistrate of any city, town or corporation therein.¹

¹ Code 1887, ch. 73, §4; Kelly's Rev. Stats., ch. 65, §3; *Bank v. Neal*, 28 W. Va. 744; *Henning v. Fisher*, 6 W. Va. 238; *Cox v. Wayt*, 26 W. Va. 807; *McMullen v. Eagan*, 21 W. Va. 233; *Henderson v. Smith*, 23 W. Va. 829; S. C. 53 Am. Rep. 139; *Adams v. Medsker*, 25 W. Va. 128; *Davis v. Living*, 9 S. E. Repr. 84; *Wise v. Postlewait*, 3 W. Va. 452; *Oney v. Clendennin*, 28 W. Va. 34; *Fleming v. Ervin*, 6 W. Va. 215.

The officer is not required to certify the identity of the grantor. No special form for an acknowledgment on behalf of a corporation is prescribed. The following form is deemed sufficient:

STATE OF..... }
COUNTY OF.....to-wit: }

I (name and title of officer), do certify that A. B., president (or other officer or agent of the corporation, who executes the deed in the name of the corporation and affixes its seal) of the (name of the corporation), whose name is signed to the writing above, bearing date on the..... day of, 18.., has this day acknowledged the same as and for the act and deed of the (name of the corporation), before me in my said county, etc.

* Given under my hand, etc.

[SEAL.]

(Signature and title.)

§497. Acknowledgment of Married Women.

The husband must join in conveyances of the wife's separate property, unless she is living separate and apart from him.¹ A separate examination of the wife is necessary to her acknowledgment. The form of joint certificate may be as follows:

STATE OF..... }
COUNTY OF..... }

I (name and title of officer), do certify that....., and....., his wife, whose names are signed to the writing above (or hereto annexed), bearing date on the day of, 18..., personally appeared before me, in the state and county aforesaid (or if it be a commissioner, in the state, territory or district aforesaid), and being examined by me privily and apart from her said husband, and having the said writing fully explained to her, she, the said....., acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand and official seal this.....day
of....., 18...

[SEAL.]

(Signature and title.)²

¹ Where a conveyance is executed by a married woman who, at the time of its execution and acknowledgment is living separate and apart from her husband, and such deed be for real estate which is her sole and separate property, such facts shall be recited in the deed, and if her husband has not joined therein, no person authorized by law to take the acknowledgment of a married woman shall take and certify the same until it is proved to his satisfaction that such real estate is the sole and separate property of such married woman, and that she was and is living separate and apart from her husband at the date of such deed and the acknowledgment thereof; and it shall be stated in the certificate of such acknowledgment that all of the said facts were shown to the satisfaction of the person taking the same. Such certificate shall in all cases, where the validity of any such deed comes in question, be *prima facie* evidence of the facts therein stated. Code 1887, ch. 66, §§1-4; Kelly's Rev. Stats., ch. 65, §6. A married woman may convey by power of attorney. *Id.* §12.

² Code, ch. 73, §4; Kelly's Rev. Stats., ch. 65, §4; *Pickens v. Knisely*, 29 W. Va. 1; s. c. 6 Am. St. Rep. 622; *Jarrell v. Jarrell*, 27 W. Va. 43; *Blair v. Sayre*, 29 W. Va. 604; s. c. 2 S. E. Repr. 97; *Watson v. Michael*, 21 W. Va. 568; *Laidley v. Cent. Land Co.*, 30 W. Va. 505; s. c. 4 S. E. Repr. 705; *Laidley v. Knight*, 23 W. Va. 735; *Laughlin v. Tream*, 14 W. Va. 322; *Leftwich v. Neal*, 7 W. Va. 569; *Bartlett v. Fleming*, 3 W. Va. 163; *Linn v. Patton*, 10 W. Va. 187.

§498. Proof by Witnesses.

Conveyances which are acknowledged do not require witnesses. Otherwise they must be attested by two witnesses, by whom proof for record may be made before the recorder of the county wherein the land lies, or before a consul in a foreign country.¹

¹ Code 1887, ch. 73, §§1-3. It is deemed safer in all cases to take the personal acknowledgment of the grantor. The following form of certificate of proof may be used:

THE STATE OF WEST VIRGINIA..... } ss.
COUNTY OF..... }

In the clerk's office of the county court of.....county (or consulate of the United States of America, at, etc.), I, ..., clerk of the county court of.....county (or I, ..., consul of the United States of America, at, etc.), do hereby certify that the foregoing deed, bearing date on the.....day of....., 18..., was this day proved before me as to A. B., the grantor (or one of the grantors) therein, by C. D. and E. F., two witnesses thereto, who declared upon oath before

me that it was his act and deed, and that they had seen him execute it.

Given under my hand, etc.

[SEAL.]

(Signature and title.)

Notice of claim of mechanic's lien, verified by affidavit, must be filed in the office of the county clerk of the county wherein the work was done, or in which the principal office, works, real estate, or personal property of an incorporated company, against which the lien is claimed, is situated, within sixty days after the lien claimant has ceased to work or furnish material. Code 1887, ch. 75, §3.

Notice of *lis pendens* is given by filing a memorandum, etc., of the suit, to be recorded in the book of deeds in the county clerk's office of the county wherein the property affected is situate. Code 1887, ch. 139, §13. Kelly's Rev. Stats., ch. 163, §14; Lecamp v. Carnahan, 26 W. Va. 839; White v. Perry, 14 W. Va. 66.

The statute requires the county clerk to set up at the door of the court-house a list of deeds recorded by him since the last term of the county court, and also to enter such list in his order book. Code 1887, ch. 139, §13; Kelly's Rev. Stats., ch. 65, §9.

WISCONSIN.

§499. Effect of Record.

Every conveyance not recorded in the office of the register of deeds for the county where the land lies, is void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall first be duly recorded.¹ A certified copy of a recorded deed may be recorded in other counties wherein a part of the lands may lie. A revocation of a recorded power of attorney must also be recorded. The statute provides for the record of patents, judgments affecting lands, attachment liens, notices of *lis pendens* and certificates of judicial sales.² Deeds, when filed, are to be fully indexed by the recorder, and are notice from the time they are properly filed and indexed.³

¹ Rev. Stats. 1878, §2241; Fallass v. Pierce, 30 Wis. 442; Ely v. Wilcox, 20 Wis. 523; s. c. 91 Am. Dec. 436; Pringle v. Dunn, 37 Wis. 449; s. c. 19 Am. Rep. 772; Newman v. Tymesou, 13 Wis. 172; s. c. 80 Am. Dec. 735; Hovt v. Jones, 31 Wis. 389; Chipman v. Tucker, 38 Wis. 43; s. c. 20 Am. Rep. 1; Troy City Bank v. Wilcox, 20 Wis. 671; Goodell v. Burnett, 22 Wis. 565; Straight v. Harris, 14 Wis. 509; Shore v. Lascar, 22 Wis. 142.

Actual notice supplies want of registry. Parker v. Kane, 4 Wis. 1; s. c. 65 Am. Dec. 283; Owens v. Roberts, 36 Wis. 258; Congar v. C. & N. W. Ry. Co., 24 Wis. 157; Bergeron v. Richardott, 55 Wis. 129; Parker v. Kane, 21 Wis. 27; Brinkman v. Jones, 44 Wis. 498; Ely v. Wilcox, *supra*; Helms v. Chadbourne, 45 Wis. 60; Hoppin v. Doty, 25 Wis. 573; Avery v. Johann, 27 Wis. 246; Gilbert v. Jess, 31 Wis. 110.

² Rev. Stats., §§2233-2236, 2246; Wisconsin Cent. Ry. Co. v. Wisconsin River Land Co., 71 Wis. 94; s. c. 36 N. W. Repr. 837.

Possession is notice. Wickes v. Lake, 25 Wis. 71; Cunningham v. Brown, 44 Wis. 72; Schwallback v. Chicago, etc., 69 Wis. 292; s. c. 2 Am. St. Rep. 740; 34 N. W. Repr. 128; Lainoreux v. Meyers, 68 Wis. 34; s. c. 31 N. W. Repr. 331; Pepper v. O'Dowd, 39 Wis. 538; Ferry v. Pfeiffer, 18 Wis. 510; Denton v. White, 26 Wis. 679.

³ Rev. Stats., §§758, 759; Oconto v. Jerrard, 46 Wis. 317; Houghton v. Burnham, 22 Wis. 301; Pringle v. Dunn, *supra*; St. Croix Land Co. v. Ritchie (Wis.), 41 N. W. Repr. 345; Lane v. Duchac (Wis.), 41 N. W. Repr. 962; Lombard v. Culbertson, 59 Wis. 537; s. c. 18 N. W. Repr. 399; Smith v. Waggoner, 50 Wis. 155; Swift v. Hall, 23 Wis. 532; Insurance Co. v. Scales, 27 Wis. 640.

Quit-claim purchaser protected. Cutler v. James, 64 Wis. 173; s. c. 54 Am. Rep. 603; Rev. Stats., §2207. Record may be partly written and partly printed. Maxwell v. Hartman, 50 Wis. 660.

A scroll will suffice for the grantor's seal. As to record of plats, see Rev. Stats., §645; Trerice v. Barteau, 54 Wis. 99.

§500. Mortgages of Realty.

When a deed purports to be an absolute conveyance in terms, but is made, or intended to be made, defeasible by force of a deed of defeasance, or other instrument for that purpose, the original conveyance is not thereby defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall also have been duly recorded.¹ An assignment of a mortgage, if indorsed on the back of the mortgage, may be recorded without acknowledgment.² Mortgages are discharged of record by an entry in the margin of the record, signed by the mortgagee or his personal representatives, and attested by the recorder; or by a certificate duly executed, acknowledged and recorded. Neglect to execute a proper discharge for seven days after request, renders the party liable in a penalty of one hundred dollars damages, and also all actual damages.³

¹ Rev. Stats. 1878, §2243; *Knowlton v. Walker*, 13 Wis. 264; *Ries v. Ludington*, 13 Wis. 276; s. c. 80 Am. Dec. 741; *Potter v. Strausky*, 48 Wis. 235; *Bassett v. McDonald*, 13 Wis. 444; *Newman v. Tymeson*, 13 Wis. 172; s. c. 80 Am. Dec. 735; *Deuster v. McCamus*, 14 Wis. 509.

² Rev. Stats., §2210. The record of the assignment is not notice to the mortgagor. §2244; *Girardin v. Lamp*, 58 Wis. 267. •

As to creditors and purchasers under the recording acts, see *Ehle v. Brown*, 31 Wis. 405; *Kelley v. Whitney*, 45 Wis. 110; s. c. 7 N. W. Repr. 126; *Funk v. Paul*, 64 Wis. 35; s. c. 54 Am. Rep. 576; 24 N. W. Repr. 419.

³ Rev. Stats., §§2247-2256; *Teetshorn v. Hull*, 30 Wis. 162. Circuit courts may order mortgages discharged on proof that the mortgage has been fully paid and satisfied, and that the mortgagee is deceased, or a non-resident of the county.

A mortgage of the homestead is not valid, unless the wife join; but she need not join in a purchase money mortgage in order to bar her dower. A mortgage may be in the common form, or in a brief form, which the statute prescribes as follows:

A. B., mortgagor, of.....county, Wisconsin, hereby mortgages to C. D., mortgagee, of.....county, Wisconsin, for the sum of.....dollars, the following tract of land in.....county (here describe the premises).

This mortgage is given to secure the following indebtedness (here state amount or amounts and form of indebtedness, whether on note, bond or otherwise, time or times when due, rate of interest, by and to whom payable, etc.).

The mortgagor agrees to pay all taxes and assessments on said premises, and the sum of.....dollars attorneys' fees in case of foreclosure hereof.

Witness the hand and seal of said mortgagor this.....day of....., 18...

A. B. (Seal.)

In presence of E. F., G. H.

§501. Acknowledgment may be made within the state before any judge or court commissioner, clerk of a circuit court, county clerk, notary public, or justice of the peace.

Without the state and within the United States, before any judge of a court of record, notary public, justice of the peace, master in chancery, or other officer thereto authorized by law to take the acknowledgment of deeds therein, or before a commissioner of deeds for Wisconsin. Unless taken before such commissioner for Wisconsin, or a notary public using a seal, the certificate of the officer must be accompanied by a certificate of the clerk, or other proper certifying officer, of a court of record of the county or district within which such acknowledgment was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be, that he believes the signature of such person subscribed thereto to be genuine, and that the deed is executed and acknowledged according to the laws of such state, territory or district.¹

In foreign countries, before any notary public with seal affixed, or other officer authorized by law there to take such acknowledgments, or any minister, *chargé d'affaires*, commissioner or consul of the United States appointed to reside therein, and certified by him.²

Corporation deeds must be signed by the president or other authorized officer, sealed with the corporate seal, and countersigned by the secretary or clerk thereof.³ A separate examination of the wife is not necessary.⁴ The form of joint certificate may be as follows:

STATE OF..... }
 COUNTY OF..... }

Personally came before me, this....day of.....,
 18..., the above (or within) named....., and
 his wife, to me known to be the persons
 who executed the foregoing (or within) instrument, and ac-
 knowledged the same.

[SEAL.]

(Signature and title.)⁵

¹ Rev. Stats., §§2208-2212, 2218; *Smith v. Garden*, 28 Wis. 685; *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772; *North v. Henneberry*, 44 Wis. 306; *Ward v. Walters*, 63 Wis. 39; s. c. 22 N. W. Repr. 844; *Yorty v. Paine*, 62 Wis. 154; s. c. 22 N. W. Repr. 137; *Maxwell v. Hartman*, 50 Wis. 660; *Smith v. Allis*, 52 Wis. 337; *Kimball v. Johnson*, 14 Wis. 674; *Leinenkugel v. Kehl*, 73 Wis. 238; s. c. 40 N. W. Repr. 683.

As to certifying identity of the grantor. *Smith v. Garden*, *supra*; *Hiles v. La Flesh*, 59 Wis. 465; s. c. 18 N. W. Repr. 435; *ante*, §§76, 77.

² Rev. Stats., ch. 100, §2220. In all cases where the deed is executed and acknowledged outside of Wisconsin, in accordance with the laws of such other place, the fact of conformity must be certified in the certificate.

Without the double certificate, the record is not effectual. *Ely v. Wilcox*, 20 Wis. 551; s. c. 91 Am. Dec. 436.

³ Rev. Stats., §2216. The common practice is for the officers signing the deed to acknowledge the same and make oath that they are such officers; that the seal is the seal of the corporation; that they have signed and acknowledged such deed and affixed the seal by order of the board of directors, trustees, or other managing board of the corporation.

⁴ Rev. Stats., §§2221-2224; *Hayes v. Frey*, 54 Wis. 503; s. c. 11 N. W. Repr. 695. The wife may convey by power of attorney. §2223; *Weisbrod v. Chicago*, etc., 18 Wis. 41; *Blount v. City of Janesville*, 31 Wis. 648. A married woman of full age (twenty-one) may, by joint or separate deed, convey her lands, or any interest therein, or her dower to any lands of her husband. §2221.

⁵ Rev. Stats., §2217; *Knight v. Leary*, 54 Wis. 470.

§502. Proof by Witnesses.

Deeds executed within the state require two subscribing witnesses, and without them the record is not good.¹ There is no statutory provision as to proof for record by subscribing witnesses without the state. Within the state it is made by a proceeding in court on summons to a refusing grantor, if to be found.²

Rev. Stats., §2316; *Herren v. Strong*, 62 Wis. 223; s. c. 22 N. W. Repr. 408; *Pringle v. Dunn*, 37 Wis. 449; s. c. 19 Am. Rep. 772; *Hrouske v. Janke*, 66 Wis. 252; s. c. 28 N. W. Repr. 166.

² Rev. Stats., §§2227-2231. See *Myrick v. McMillan*, 13 Wis. 188, 191, for certificate held good.

§503. Chattel Mortgages, not accompanied by change of possession, are not valid against any other person than the parties thereto, unless filed, or a copy thereof, in the town, city or village where the mortgagor resides, or if he be a non-resident of the state, in the town, city or village where the property is situated at the time of the execution of the mortgage. The record is not good for longer than two years, unless within thirty days next preceding the expiration of the two years, the mortgagee, his agent or attorney, shall file with the mortgage an affidavit setting forth the interest which the mortgagee has, by virtue of such mortgage, in the property. Such affidavit must be so filed every two years in order to continue the record lien.¹ Conditional sales are to be recorded as chattel mortgages, and with like effect.² Chattel mortgages upon exempt personal property are not valid, unless signed by the wife of the mortgagor, if he be a married man and his wife a member of his family, and her signature must be witnessed by two witnesses.

Where the mortgagor retains possession of stock in trade under an agreement to apply proceeds of sales upon the debts, he must file, in the office where the mortgage is filed, a sworn statement, in writing, of sales made, and amounts to be applied upon the mortgage debt, and the total valuation of stock added every sixty days from the date of such mortgage or last statement filed. A delay of fifteen days to file such statement makes the mortgage due, and it ceases to be a lien as to third parties.³ On payment of the mortgage debt, the mortgagor may demand a certificate from the mortgagee stating such payment, which certificate may be filed by the mortgagor, and he may then remove the mortgage from the files.⁴

¹ Rev. Stats., §§2313-2318; *Hill v. Merrimon*, 72 Wis. 483; *First Nat. Bank v. Damm*, 63 Wis. 249; s. c. 23 N. W. Repr. 249; *Cass v. Jewett*,

13 Wis. 498; s. c. 80 Am. Dec. 752; *Swift v. Hall*, 23 Wis. 532; *Morrow v. Reed*, 30 Wis. 81; *Lamson v. Moffatt*, 61 Wis. 153; s. c. 21 N. W. Repr. 62; *Knapp v. Deitz*, 64 Wis. 31; s. c. 24 N. W. Repr. 471; *Colton v. Marsh*, 3 Wis. 221; *Donaldson v. Johnson*, 2 Chand. 160; *Standard Paper Co. v. Guenther*, 67 Wis. 101; s. c. 30 N. W. Repr. 298; *Sanger v. Freie Press Co. (Wis.)*, 41 N. W. Repr. 436; *Houghton v. Burnham*, 22 Wis. 301; *Smith v. Waggoner*, 50 Wis. 155; s. c. 6 N. W. Repr. 568; *Paine v. Benton*, 32 Wis. 491; *Harrington v. Brittan*, 23 Wis. 541; *Comstock v. Scales*, 7 Wis. 159; *Blakeslee v. Rossman*, 43 Wis. 116; *Fowler v. Hunt*, 48 Wis. 345; *Steinart v. Deuster*, 23 Wis. 136.

² Rev. Stats., §2317; *Rawson v. Richards*, 69 Wis. 643; s. c. 35 N. W. Repr. 40; *Thomas v. Richards*, 69 Wis. 671; s. c. 35 N. W. Repr. 42.

³ Laws 1887, ch. 24. A chattel mortgage executed by an insolvent debtor upon his property within sixty days prior to the making of an assignment, and in contemplation thereof, or of insolvency, becomes void if the mortgagee knew, or had reasonable cause to believe, such debtor insolvent. *Id.*

⁴ Laws 1887, ch. 480. A claim of mechanic's lien, by a principal contractor, must be filed with the clerk of the circuit court within six months from the date of the last charge, and action brought to enforce it within one year from such date, unless within thirty days next preceding the expiration of the year an affidavit be annexed to the lien on file, setting forth the interest which the lien claimant has by virtue of the lien in the property. This continues the lien for one year. Sub-contractors have a similar lien, if filed within thirty days after the last charge. Rev. Stats., §3318; *Shaw v. Allen*, 24 Wis. 534; *Wilson v. Rudd*, 70 Wis. 98; s. c. 35 N. W. Repr. 321.

WYOMING TERRITORY.

§504. Effect of Record.

Unrecorded conveyances are void as against subsequent purchasers in good faith for valuable consideration, whose conveyances shall be first duly recorded. A purchaser is defined to be any person to whom any estate or interest in real estate shall be conveyed for a valuable consideration, and also every assignee of a mortgage or lease, or other conditional conveyance. A power of attorney to convey real estate must be executed and recorded in the same manner as the conveyance itself.¹

¹ Rev. Stats. 1887, §§17-23. The instrument takes effect as to subsequent purchasers from the time of its delivery to the recorder. §17.

A scroll will suffice for a seal. A certified copy of a duly recorded instrument may be given in evidence as proof of execution, upon affidavit of the party offering it that the original is not in his possession, nor in his power to produce. §20.

Deeds or mortgages of pews or slips in any church are entitled to record. §19.

§505. Mortgages, Real and Chattel.

The statute requires the record of defeasances, and provides that a recorded assignment of a mortgage shall not be notice to the mortgagor so as to invalidate payments by him to the mortgagee. Mortgages may be discharged of record by an entry in the margin of the record, or by certificate duly acknowledged and recorded.¹ Chattel mortgages are executed and recorded as other conveyances, and if not accompanied and followed by change of possession, are not effectual against any third party acting in good faith, unless recorded in the county where the property is situate. If the property be removed, the mortgage must be recorded again in the county to which it is removed. The record continues in force for the term for which the mortgage has been given, and for only two months thereafter, unless an affidavit of renewal be filed, which continues the lien for one year.²

¹ Rev. Stats. 1887, §§21-22, 30-32. A mortgagee failing for seven days after proper request to give a certificate of release is liable to the mortgagor in the sum of \$100 and all actual damages. §32.

² Rev. Stats., §§70-75; Laws 1877, p. 20, §§1-5. The affidavit must set forth the claim of the mortgagee to the property, or any part thereof,

and must be filed at or before the expiration of the two months. The record may be renewed annually in this manner. When a chattel mortgage is duly recorded, the mortgagor may retain possession of the property.

§506. Acknowledgment may be made within the territory before any judge or clerk of a court of record, court commissioner, county clerk, justice of the peace, or notary public.

Without the territory and within the United States, and in accordance with the laws of the place where made, before any officer authorized by the laws of his state or territory to take acknowledgments, or a commissioner of deeds for Wyoming. When not made before a clerk of a court of record or commissioner of deeds, there must be a certificate from a clerk, or other proper certifying officer, as to the authority and genuine signature of the acknowledging officer, and that the conveyance is executed according to the laws of such state or territory.

In foreign countries, before a consul or vice-consul of the United States, and in accordance with the law of Wyoming.¹ A separate examination of the wife is not necessary, except in a conveyance of the homestead.² The form of certificate may be as follows:

STATE (OR TERRITORY) OF..... }
COUNTY OF..... }

Be it remembered that on the.....day of....., in the year 18..., before me, the subscriber (name and title of officer), in and for said county, personally came....., and....., his wife, the grantors in the foregoing deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein mentioned.

[SEAL.]

(Signature and title.)

Conveyances require one attesting witness, but the statute does not provide for proof for record by a witness.³

¹ Rev. Stats. 1887, §§8-11.

² Rev. Stats., §2. A married woman's acknowledgment taken out of the territory may be taken as if she "were *sole*. §13. A conveyance or mortgage of the homestead is void unless the wife of the grantor, if he have one, separate and apart from her husband, shall sign and acknowledge the same, after being apprised of her right, and the effect of such act. §2784.

³ Rev. Stats., §8. A register of deeds who receives and records any instrument not executed, acknowledged or proved according to law, is liable to a fine of \$100, payable to the aggrieved party. §29.

Claims of lien by mechanics and materialmen must be filed for record within ninety days after the work is finished, or the last item of material furnished. §1511.

Table of Cases.

TABLE OF CASES.

[A number of late cases, cited in the body of the work by reference only to the volumes of the Reporter system, are here given with reference to the volumes of the State Reports in which they subsequently appeared.]

- Abadie v. Lobero, 36 Cal. 390. §44.
 Abbott v. Cottage City, 143 Mass. 521. §49.
 Abel v. Howe, 43 Vt. 403. §241.
 Abrams v. Erwin, 9 Iowa, 87. §62.
 Acer v. Westcott, 46 N. Y. 384; s. c. 7 Am. Rep. 355. §§4, 152, 177, 223, 267.
 Ackert v. Pulitz, 7 Barb. 386. §117.
 Adair v. Davis, 71 Ga. 769. §§132, 133.
 Adam v. Mengel (Pa.), 8 Atl. Repr. 606. §64.
 Adams v. Buchanan, 49 Mo. 64. §§20, 54.
 — v. Cook, 55 Tex. 161. §47.
 — v. Daunis, 29 La. Ann. 315. §§173, 189, 196, 217.
 — v. Edgerton, 48 Ark. 419, §147.
 — v. Hayden, 60 Tex. 223. §§6, 134, 188.
 — v. Medsker, 25 W. Va. 128. §§70, 71.
 — v. Odum (Tex.), 12 S. W. Repr. 34. §191.
 Addis v. Graham, 88 Mo. 197. §150.
 Ætna Life Ins. Co. v. Bishop, 69 Iowa, 645. §§143, 171.
 — v. Ford, 89 Ill. 252. §181.
 Ahern v. White, 39 Md. 409. §172.
 Ahrend v. Odiorne, 118 Mass. 261. §20.
 Ainslie v. Kohn, 16 Or. 363. §46.
 Alabama Ins. Co. v. Boykin, 38 Ala. 510; s. c. 65 Am. Dec. 349. §§23, 99, 108, 120.
 — v. Oliver, 78 Ala. 158. §28.
 Alderman v. Phelps, 15 Mass. 225. §259.
 Alderson v. Ames, 6 Md. 52. §§19, 38.
 Aldrich v. Ætna Co., 8 Wall. 491. §276.
 — v. Stephens, 49 Cal. 676. §191.
 Alexander v. DeKernel, 81 Ky. 345. §144.
 — v. Merry, 9 Mo. 514. §77.
 Alford v. Jones, 71 Tex. 519. §134.
 Allen v. Atchison, 26 Tex. 616. §43.
 — v. Cadwell, 55 Mich. 8; s. c. 20 N. W. Repr. 692. §§216, 228.
 — v. Delano, 55 Me. 113; s. c. 92 Am. Dec. 573. §249.
 — v. Holden, 32 Ga. 423. §§124, 129.
 — v. Hooper, 50 Me. 371. §§100, 116.
 — v. Lenoir, 53 Miss. 321. §§109, 121.
 — v. McCalla, 25 Iowa, 464; s. c. 96 Am. Dec. 64. §269.
 — v. McKeen, 1 Sum. 312. §64.
 — v. Parish, 3 Ohio, 107. §11.
 — v. Poole, 54 Miss. 323. §§216, 238.
 — v. Reynolds, 35 N. Y. (4 Jones), 297. §103.
 — v. Whetstone, 35 La. Ann. 850. §52.
 — v. Woodruff, 96 Ill. 11. §37.
 Allendorf v. Gaugengihl, 146 Mass. 542. §115.
 Allison v. Hagan, 12 Nev. 38. §155.
 — v. Thomas, 72 Cal. 562; s. c. 1 Am. St. Rep. 89. §§27, 183.
 Allston v. Allston, 2 Tread. Const. Rep. 604; s. c. 4 S. Car. 116. §§132, 187.
 Almy v. Wilbur, 2 Woodb. & M. 371. §250.

- Alverson v. Jones, 10 Cal. 9; s. c. 70 Am. Dec. 689. §182.
 Alvis v. Morrison, 63 Ill. 181; s. c. 14 Am. Rep. 117. §187.
 Ambrose v. Raley, 58 Ill. 506. §233.
 Ames v. Phelps, 18 Pick. 314. §140.
 — v. Warren, 76 Ind. 512; s. c. 40 Am. Rep. 258. §§266, 268.
 Amphlet v. Hubbard, 29 Mich. 298. §172.
 Anderson v. Baughman, 7 Mich. 69. §147.
 — v. Bewley, 11 Heisk. 29. §106.
 — v. Critcher, 11 Gill & J. 450. §28.
 — v. Dugas, 29 Ga. 440. §§7, 29.
 — v. Harris, 1 Bailey, 315. §28.
 — v. Jackson, 69 Tex. 346. §234.
 — v. Layton, 3 Bush. 87. §178.
 — v. Logan, 99 N. C. 474. §130.
 — v. Miller, 15 Miss. (Sm. & M.), 586. §213.
 — v. Nagle, 12 W. Va. 98. §10.
 — v. Seaman, 49 Ark. 475. §46.
 Andrews v. Andrews, 3 Wash. 286. §114.
 — v. Marshall, 26 Tex. 212. §96.
 — v. Matthews, 59 Ga. 466. §194.
 Angier v. Schieffelin, 72 Pa. Stat. 106; s. c. 13 Am. Rep. 659. §§70, 79, 82.
 Anglade v. St. Avit, 67 Mo. 434. §175.
 Anketel v. Converse, 17 O. St. 11. §§166, 240.
 Ann Berta Lodge v. Levertton, 42 Tex. 18. §118.
 Ansley v. Pasharo, 22 Neb. 662. §20.
 Anthony v. Butler, 13 Pet. 423. §§136, 148, 188, 252, 272.
 Appeal of Cessna (Pa.), 10 Atlantic Repr. 1. §45.
 Apperson v. Burgett, 33 Ark. 328. §§42, 192.
 Applegate v. Gracy, 9 Dana, 215. §182.
 — v. Lexington, 117 U. S. 256. §95.
 Appleton Mill Co. v. Warder, (Minn.) 42 N. W. Repr. 791. §382.
- Applewhite v. Harrell, 49 Ark. 279. §§247, 254.
 Acuirre v. Alexander, 58 Cal. 21. §235.
 Archibald v. Citizen's Bk. 64 Miss. 523. §276.
 Arginsinger v. Cline, 69 Iowa, 435. §97.
 Arledge v. Hall, 54 Tex. 398. §199.
 Arlin v. Brown, 44 N. H. 102. §20.
 Armentrout v. Gibbons, 30 Gratt. 632. §187.
 Armijo v. Armijo, 13 Pacific Repr. 92. §21.
 Armstrong v. Abbott, 11 Colo. 220. §244.
 — v. Morrill, 4 Wall. (S1 U. S.), 146. §237.
 Ashbrooks v. Roberts, 82 Ky. 298. §154.
 Ashton's Appeal, 73 Pa. St. 153. §§155, 204, 207.
 Astor v. Wells, 4 Wheat. 466. §§134, 187, 238, 240, 242.
 Atherton v. Phoenix Ins. Co., 109 Mass. 32. §275.
 Atkinson v. Richardson, 74 N. C. 455. §117.
 Atlantic Bk. v. Savery, 82 N. Y. 291. §244.
 Attaway v. Carter, 1 Tex. Un. Cas. 73, 77. §84.
 Atterbury v. Wallis, DeG. M. & G. 454. §243.
 Atwood v. Vincent, 17 Conn. 595. §20.
 Aubuchan v. Bender, 44 Mo. 560. §1, 154, 204.
 Aultman v. Guy, 41 O. St. 598. §262.
 Austin v. Dean, 40 Mich. 386. §25.
 — v. King, 91 N. C. 280. §§189, 217.
 — v. Underwood, 37 Ill. 478. §169.
 Avent v. McCorkle, 45 Miss. 221. §20.
 Averill v. Wilson, 4 Barb. 183. §129.
 Avery v. Johann, 27 Wis. 246. §222.
 Aycock v. Kimbrough, 71 Tex. 330. §48.
 Ayers v. Hays, 60 Ind. 452. §175.
 Ayres v. Duprey, 27 Tex. 594; s. c. 86 Am. Dec. 637. §§10, 12, 192, 196, 198, 199, 212.

B.

- Baals v. Stewart, 109 Ind. 371. §249.
 Babbitt v. Johnson, 15 Kan. 252. §62.
 Babcock v. Jordan, 24 Ind. 14. §207.
 Bacheman v. Chaperon, 15 La. Ann. 4. §175.
 Bacon v. Bacon, Tothill, 133. §182.
 — v. Thompson, 60 Iowa, 285. §268.
 — v. Van Schoonhoven, 19 Hun, 158; s. c. 87 N. Y. 446. §33.
 Badger v. Batavia M. Co., 70 Ill. 302. §§41, 254.
 — v. Daniel, 77 N. C. 251. §43.
 Bagby v. Emberson, 79 Mo. 179. §§98, 101, 105, 107, 109.
 Bailey v. Bailey, 8 Ohio, 239. §11.
 — v. Carleton, 12 N. H. 9. §234.
 — v. Crim. 9 Biss. 95. §§154, 209.
 — v. Gould, Walk. (Mich.), 478. §171.
 — v. Landingham, 53 Iowa, 722. §90.
 — v. Myrick, 50 Me. 171. §§32, 154.
 — v. Richardson, 9 Hare, 734. §228.
 — v. Tindall, 59 Tex. 530. §20.
 — v. Trammell, 27 Tex. 317. §44.
 Baird v. Evans, 58 Ga. 350. §127.
 Baker v. Bliss, 39 N. Y. 70. §§176, 227.
 — v. Clepper, 26 Tex. 629. §172.
 — v. Griffin, 50 Miss. 158. §21.
 — v. Martin, 12 Wall. 150. §192.
 — v. Mather, 25 Mich. 51. §178.
 — v. Pierson, 5 Mich. 476. §44.
 — v. Power, 7 Mont. 326. §271.
 — v. Woodward, 12 Or. 3. §§183, 192.
 — v. Vining, 30 Me. 21. §213.
 Baldwin v. Baldwin, 2 Humph. 476. §195.
 — v. Crow (Ky.), 7 S. W. Repr. 146. §268.
 — v. Marshall, 2 Humph. 116. §93.
 — v. Peet, 22 Tex. 718. §210.
 — v. Richardson, 33 Tex. 16. §§57, 128.
 — v. Sager, 70 Ill. 503. §§205, 206.
 Baldwin v. St. Louis Ry. Co., 75 Ia. 297; s. c. 39 N. W. Repr. 507. §244.
 — v. Snowden, 11 O. St. 203; s. c. 78 Am. Dec. 303. §89.
 — v. The Bradish Johnson, 3 Woods, 582. §276.
 — v. Thompson, 15 Iowa, 504. §164.
 — v. Walker, 21 Conn. 168. §28.
 Ballard v. Burgett, 40 N. Y. 314. §§248, 250.
 — v. Perry, 28 Tex. 347, 364. §§56, 74, 150.
 Ballow v. Hudson, 13 Gratt. 672. §51.
 Baltimore & O. Ry. v. McKenzie, 81 Va. 71. §244.
 Banco de Lima v. Anglo-Peruvian Bk., 8 Ch. Div. 25 Eng. R. 160. §244.
 Bank v. Ackerman, 70 Tex. 429. §172.
 — v. Ammon, 27 Pa. St. 172. §147.
 — v. Anderson, 14 Iowa, 544. §175.
 — v. Carpenter, 7 Ohio, 68. §§17, 217.
 — v. Clapp, 76 N. C. 482. §15.
 — v. Darien, 1 Stew. (Ala.), 280. §244.
 — v. Flagg, 3 Barb. Ch. 316. §236.
 — v. Hunt, 11 Wall. 391. §213.
 — v. Jones, 59 Ala. 123. §54.
 — v. Neal, 28 W. Va. 744. §§8, 218, 196.
 — v. Noe, 86 Tenn. 21. §196.
 — v. Paul, 75 Va. 594; s. c. 40 Am. Rep. 740. §71.
 — v. Sawyer, 38 O. St. 339, 343. §177.
 Bank of America v. McNeil, 10 Bush, 54. §238.
 Bank of Augusta v. Earle, 13 Pet. 586. §263.
 Bank of Commerce v. Lanahan, 45 Md. 396. §210.
 Bank of Greensboro v. Clapp, 76 N. C. 482. §39.
 Bank of Healdsburg v. Baillhache, 65 Cal. 406; s. c. 4 Pac. Repr. §101.
 Bank of Louisville v. Gray, 84 Ky. 565. §117.
 Bank of New Milford v. Town of New Milford, 36 Conn. 93. §§238, 239, 243.

- Bank v. M'fng Co., 96 N. C. 298. §§12, 14, 165, 169, 196, 216, 217.
- Bank of U. S. v. Benning, 4 Cranch C. Ct. 81. §237.
- v. Davis, 2 Hill, 415. §238.
- v. Lee, 13 Pet. (38 U. S.) 107. §266.
- Bankhead v. Owens, 60 Ala. 457. §20.
- Banks' Appeal, 36 Pa. St. 170. §164.
- Banks v. Lee, 73 Ga. 25. §57.
- v. Ogden, 2 Wall. 57. §49.
- Banning v. Banning, 80 Cal. 271. §121.
- v. Edes, 6 Minn. 402. §172.
- Bannon v. Bowler, 34 Minn. 416. §§246, 261.
- Banta v. Vreeland, 15 N. J. Eq. 103. §175.
- Barber v. Richardson, 57 Vt. 408. §245.
- Barbour v. Wiehle, 116 Pa. St. 308. §§238, 240, 241.
- Barclay v. Howell, 6 Pet. 513. §234.
- Barelle v. Delassus, 16 La. Ann. 280. §173.
- Barker v. Bell, 37 Ala. 354. §42.
- v. Stacy, 25 Miss. 471. §266.
- Barnard v. Campau, 29 Mich. 162. §§17, 227.
- v. Campbell, 58 N. Y. 73; s. c. 17 Am. Rep. 208. §§154, 245.
- Barnes v. McClinton, 3 Penn. 67. §§222, 237.
- v. Mott, 64 N. Y. 397. §175.
- v. Trenton Gas Co., 27 N. J. Eq. 33. §§243, 244.
- v. Union, 91 Ind. 301. §222.
- Barnett v. Barnett, 15 Serg. & R. 72; s. c. 16 Am. Dec. 518. §§87, 97, 102, 107, 120.
- v. Preskauer, 62 Ala. 486. §90.
- Barnev v. Sutton, 2 Watts, 31. §§8, 52, 73.
- v. McCarty, 15 Iowa. 515; s. c. 83 Am. Dec. 427. §§16, 17, 142.
- v. H. B. Ins. Co., 110 N. Y. 1. §24.
- Barnhart v. Greenshields, 9 Moore P. C. 36. §236.
- Barnum v. Landon, 25 Conn. 137, 141. §23.
- Barr v. Cannon, 69 Iowa, 20. §§253, 273.
- v. Gratz, 4 Wheat. 213. §§95, 234.
- Barrett v. Barrett, 31 Tex. 344, 350. §§4, 194, 196, 203.
- v. Prentiss, 57 Vt. 297. §142.
- Barrows v. Turner, 50 Me. 127. §265.
- Bartlett v. Bangor, 67 Me. 460. §49.
- v. Boyd, 34 Vt. 256. §272.
- v. Fleming, 3 W. Va. 163. §109.
- v. Glasscock, 4 Mo. 62. §224.
- v. Simmons, 4 Jones Law, 295. §233.
- Barton v. Hosner, 24 Hun. 468. §211.
- v. Morris, 15 Ohio, 408. §§23, 79, 81, 97, 121.
- Baskin v. Vernon, 74 Ga. 370. §267.
- Bass v. Estill, 50 Miss. 300. §55.
- Bassett v. McDonald, 13 Wis. 444. §171.
- v. Hathaway, 9 Mich. 28. §171.
- Basshor v. Stewart, 54 Md. 376. §81.
- Batchelor v. Brereton, 112 U. S. 396. §69.
- Bateman v. Backus (Dak.), 34 N. W. Repr. 66. §44.
- Bateman's Petition, 11 R. I. 393. §§107, 110.
- Bates v. Norcross, 14 Pick. 224. §162.
- Batey v. Woolfolk, 20 La. Ann. 385. §173.
- Batte v. Stone, 4 Yerg. 168. §§126, 145.
- Battin v. Bigelow, 1 Pet. C. C. 452. §168.
- Batts v. Scott, 37 Tex. 59. §19.
- Bauner v. Ward, 12 Fed. Repr. 820. §233.
- Baxter v. Bodkin, 25 Ind. 172. §100.
- Bay v. Coddington, 20 Johns. 637; s. c. 11 Am. Dec. 342. §§207, 208.
- Bayley v. Greenleaf, 7 Wheat. 46. §§20, 200.
- Baynard v. Norris, 5 Gill. 483; s. c. 46 Am. Dec. 647. §§181, 182, 216, 228.
- Baze v. Arper, 6 Minn. 220. §§61, 73, 192.
- Bazemore v. Davis, 55 Ga. 504. §158.
- Beach v. Derby, 19 Ill. 617. §253.
- Beadles v. Miller, 9 Bush, 405. §179.
- Beal v. Gordon, 55 Me. 482. §§12, 221, 222, 229.

- Beal v. Stevens, 72 Cal. 451. §34.
 Beals v. Hale, 4 How. 37. §§31, 136, 188.
 Beall v. Williamson, 14 Ala. 55. §§265, 267.
 Beaman v. Whitney, 29 Me. 413. §67.
 — v. Lowton, 37 Me. 513. §254.
 Bean v. Edge, 84 N. Y. 510. §250.
 — v. Smith, 2 Mason, 252. §155.
 Beattie v. Butler, 21 Mo. 313. §236.
 Beatty v. Whitaker, 23 Tex. 526. §§96, 205.
 Beaumont v. Preston, 65 Tex. 448. §96.
 — v. Yeatman, 8 Humph. 542. §§59, 62.
 Beavers v. Lane, 6 Duer, 238. §250.
 Beaver v. Slanker, 94 Ill. 175. §§78, 146.
 Beck v. Blue, 42 Ala. 32; s. c. 94 Am. Dec. 630. §250.
 Becker v. Quigg, 54 Ill. 390. §115.
 Beckwith v. Windsor Co., 14 Conn. 594. §60.
 Bedford v. Tupper, 30 Hun. 174. §142.
 Beebe v. Coleman, 8 Paige, 392. §28.
 Beene v. Randall, 23 Ala. 514. §216.
 Beers v. Waterbury, 8 Bosw. 396. §260.
 Belbaze v. Ratto, 69 Tex. 636. §143.
 Belcher v. Fox, 60 Tex. 527. §56.
 — v. Weaver, 46 Tex. 294; s. c. 26 Am. Rep. 267. §§19, 79, 82, 98, 109, 111, 112.
 Belden v. Meeker, 47 N. Y. 307. §33.
 Belknap v. Wendell, 31 N. H. 92. §271.
 Bell v. Duncan, 11 Ohio, 192. §§177, 180.
 — v. Fry, 5 Dana, 341. §66.
 — v. Lyle, 10 Lea, 44. §§76, 113.
 — v. Teague (Ala.), 3 South. Repr. 861. §47.
 — v. Thomas, 2 Iowa, 384. §12.
 — v. Twilight, 18 N. H. 159; s. c. 45 Am. Dec. 367. §155.
 — v. Twilight, 22 N. H. 500. §235.
 — v. Tyson, 74 Ala. 353. §226.
 Bellas v. McCarty, 10 Watts, 13. §§4, 14, 19, 35, 203, 227.
 Belo v. Mayer, 79 Mo. 67. §§66, 71, 104, 105.
 Benedict v. Smith, 10 Paige, 126 §136.
 Benham v. Keane, 1 John. & H. 685. §216.
 Benjamin v. Davis, 73 Iowa, 715. §44.
 Benner v. Puffer, 114 Mass. 376. §249.
 Bennett v. Fowkes, 1 Neb. 465. §166.
 — v. Paine, 7 Watts, 334; s. c. 32 Am. Dec. 765. §§70, 71, 87.
 — v. Robinson, 27 Mich. 26. §231.
 — v. Shipley, 82 Mo. 448. §§35, 67.
 — v. Titherington, 6 Bush, 196. §§132, 203, 239.
 Bent v. Coleman, 89 Ill. 364; s. c. 7 Am. Rep. 366. §147.
 Benton v. Beer, 35 Barb. 78. §101.
 — v. Nicholl, 24 Minn. 221. §§31, 137, 142.
 Benzein v. Lenoir, 1 Mur. (N. C.), 194. §29.
 Bercaw v. Cockerill, 20 O. St. 163. §§165, 196, 217.
 Bergeron v. Richardott, 55 Wis. 129. §216.
 Bernard v. Elder, 50 Miss. 336. §109.
 Bernstine v. Smith, 10 Kan. 60. §25.
 Berry v. Donley, 26 Tex. 737, 739. §§87, 98, 93, 94, 101, 123.
 — v. Mut. Ins. Co., 2 Johns. Ch. 603. §§28, 209.
 Berson v. Nunan, 63 Cal. 550. §§252, 254.
 Berwin v. Weiss, 28 La. 363. §§12, 165.
 Best v. Staple, 61 N. Y. 71. §275.
 Betser v. Rankin, 77 Ill. 289. §135.
 Betz v. Mulin, 62 Ala. 365. §§7, 132.
 Bevans v. Bolton, 31 Mo. 437. §265.
 Bickley v. Keenan, 60 Ala. 293. §§246, 261, 262.
 Bieman v. White, 23 S. Car. 490. §228.
 Biencourt v. Parker, 27 Tex. 558. §64.
 Bierce v. Red Bluff Hotel Co., 31 Cal. 160. §§241, 244.
 Bigelow v. Booth, 39 Mich. 624. §85.
 — v. Foss, 59 Me. 162. §§99, 102.
 — v. Livingston, 28 Minn. 57. §59.

- Bigelow v. Topliff, 25 Vt. 274; s. c. 60 Am. Dec. 264. §272.
- Bigley v. Jones, 114 Pa. St. 510. §238.
- Billgery v. Ferguson, 30 La. Ann. 84. §204.
- Billings v. Martin (Me.), 10 Atl. Repr. 445. §47.
- v. Stark, 15 Fla. 297. §144.
- Billington v. Welch, 5 Binn. 129; s. c. 6 Am. Dec. 406. §§234, 235.
- Bingham v. Jordan, 1 Allen, 373; s. c. 79 Am. Dec. 748. §§41, 213, 218, 254, 269.
- v. Kirtland, 34 N. J. Eq. 229. §§157, 160.
- Bird v. Dennison, 7 Cal. 297. §4.
- v. Wilkinson, 4 Leigh, 266. §§165, 255.
- Birdsall v. Russell, 29 N. Y. 220, 249. §§220, 221.
- Birnie v. Main, 29 Ark. 591. §§21, 162, 163, 164, 172.
- Bisco v. Banbury, 1 Ch. Cas. 287. §181.
- Biscoe v. Byrd, 15 Ark. 655. §§61, 65.
- Bishop v. Cook, 13 Barb. 326. §148.
- v. Schneider, 46 Mo. 472; s. c. 2 Am. Rep. 533. §§23, 61, 142, 145, 204.
- Bissell v. Hopkins, 3 Cow. 166; s. c. 15 Am. Dec. 359. §254.
- v. N. Y. Cent. Ry. Co., 23 N. Y. 61; s. c. 26 Barb. 63. §49.
- v. Nooney, 33 Conn. 411. §28.
- Biteler v. Baldwin, 42 O. St. 125. §257.
- Bither v. Buswell, 51 Me. 601. §261.
- Black v. Justice, 86 N. C. 504. §§122, 130.
- v. Vaughan, 70 Tex. 47. §§54, 189.
- Blackburn v. Gregson, 1 Bro. Ch. 420. §20.
- v. Pennington, 8 B. Mon. 219. §109.
- Blackwell v. Walker, 5 Fed. Repr. 419. §249.
- Blades v. Blades, 1 Eq. Cas. Abr. 358. §2.
- Blair v. Sayre, 29 W. Va. 604. §§110, 111.
- v. Ward, 10 N. J. Eq. 119. §164.
- Blake v. Graham, 6 O. St. 580. s. c. 67 Am. Dec. 360. §§162, 184.
- Blalock v. Newhill, 78 Ga. 245. §12.
- Blanchard v. Taylor, 7 B. Mon. 647. §88.
- v. Tyler, 12 Mich. 339; s. c. 86 Am. Dec. 57. §§144, 216, 202.
- Blankenship v. Douglass, 26 Tex. 229; s. c. 82 Am. Dec. 608. §§10, 19.
- Blatchford v. Boyden, 122 Ill. 657. §§172, 269.
- Blatchley v. Osborn, 33 Conn. 226. §§4, 155, 182, 222, 224.
- Bledsoe v. Rogers, 3 Sneed, 466. §167.
- Blight v. Banks, 6 Mon. 192; s. c. 17 Am. Dec. 136. §§155, 203, 205.
- Blondy v. Benedict, 42 O. St. 298. §271.
- Blood v. Blood, 23 Pick. 80. §55.
- v. Wood, 1 Met. 528. §234.
- Bloom v. Noggle, 4 O. St. 45. §§189, 211, 216, 217.
- v. Sims, 27 S. Car. 90. §190.
- Bloomer v. Henderson, 8 Mich. 395, 405; s. c. 77 Am. Dec. 453. §230.
- Blouchard v. Tyler, 12 Mich. 339; s. c. 86 Am. Dec. 57. §202.
- Blount v. The City of Janesville, 31 Wis. 648. §97, 120.
- Blumenthal v. Brainerd, 38 Vt. 402. §241.
- Blunt v. Norris, 123 Mass. 55. §§34, 175.
- Blythe v. Dargin, 68 Ala. 370. §117.
- v. Houston, 46 Tex. 67, 79. §§72, 96.
- Board v. Babcock, 5 Or. 472. §142.
- Boatmen's Sav. Bk. v. Grewe, 84 Mo. 478. §175, 204.
- Boggs v. Anderson, 50 Me. 161. §231.
- v. Varner, 6 Watts & S. 469. §§14, 166, 180, 181, 237.
- Bogue v. Bigelow, 29 Vt. 179. §§57, 78.
- Bolles v. Carli, 12 Minn. 113. §172.
- Bolling v. Teel, 76 Va. 487. §§107, 110.
- Bolton v. The J. L. Pendergast, 30 Fed. Repr. 717. §275.
- Bondurant v. Watson, 103 U. S. (13 Otto), 281. §173.
- v. Watson, 20 La. Ann. 385. §173.
- Bonnell v. Allerton, 51 Iowa, 166. §232.
- Bonner v. Stephens, 60 Tex. 616. §§2, 114, 216, 219.

- Bonner v. Ware, 10 Ohio, 465. §177.
 Boody v. Davis, 20 N. H. 140; s. c. 51 Am. Dec. 210. §144.
 Boon v. Barnes, 23 Miss. 136. §§204, 207.
 Boone v. Chiles, 10 Pet. 177. §§155, 204, 205.
 Booth v. Cook, 20 Ill. 129. §73.
 — v. Kehoe, 71 N. Y. 341. §§28, 252.
 Boothroyd v. Engle, 23 Mich. 19. §57.
 Borland v. Walrath, 33 Iowa, 130. §§87, 90.
 Borst v. Empie, 5 N. Y. 33. §130.
 Boston v. Cummings, 16 Ga. 102. §174.
 Bostwick v. Powers, 12 Iowa, 456. §143.
 Boswell v. Goodwin, 31 Conn. 74. §§164, 165.
 Bours v. Zachariah, 11 Cal. 281; s. c. 70 Am. Dec. 779. §92.
 Boursot v. Savage, L. R., 2 Eq. 134, 142. §§238, 243.
 Boutwell v. Steiner, 84 Ala. 307; s. c. 5 Am. St. Rep. 375. §§151, 175.
 Bowby v. Thunder, 3 Atl. Rep. (Pa.) 588. §§82, 91.
 Bowles v. Rogers, 6 Ves. 95. §20.
 Bowling v. Cook, 39 Iowa, 200. §§33, 175, 209.
 Boyce v. Grundy, 3 Pet. 310. §§178, 223.
 — v. Stanton, 15 Lea (83 Tenn.), 346. §§140, 163.
 Boyd v. Beck, 29 Ala. 713. §§10, 261.
 — v. Mundorf, 30 N. J. Eq. 545. §§160, 172.
 — v. Schlossinger, 59 N. Y. 301. §§40, 188.
 — v. Turpin, 94 N. C. 137. §116.
 — v. Yerkes, 25 Ill. App. 527. §242.
 Boydston v. Morris, 71 Tex. 697. §272.
 Boykin v. Rain, 28 Ala. 332; s. c. 65 Am. Dec. 349. §§5, 108, 109.
 Boyle Ice Co. v. Gould, 73 Cal. 153. §252.
 Boynton v. Libby, 62 Me. 253. §251.
 — v. Rees, 8 Pick. 329; s. c. 19 Am. Dec. 326. §155.
 Brace v. Marlborough, 2 P. Wms. 491. §192.
 Bracken v. Jones, 63 Tex. 184. §234.
 — v. Miller, 4 Watts & S. 102. §§155, 241.
 Bracklen v. Fonda, 12 Johns. 468; s. c. 7 Am. Dec. 339. §121.
 Bradbury v. Johnson, 41 Me. 582; 66 Am. Dec. 264. §275.
 Braden v. Gose, 57 Tex. 37. §185.
 Bradford v. Dawson, 2 Ala. 203. §52.
 — v. Miller, 12 Iowa, 14. §16.
 — v. Tupper, 30 Hun. 174. §16.
 Bradlee v. Whitney, 108 Pa. St. 362. §245.
 Bradley v. Mo. P. Ry. Co., 91 Mo. 493. §104.
 — v. Riches, L. R., 9 Ch. D. 189. §238.
 — v. West, 60 Mo. 33. §66.
 Bradshaw v. Atkins, 110 Ill. 323. §§9, 100.
 — v. Warner, 54 Ind. 58. §249.
 Bradstreet v. Clarke, 12 Wend. 673. §128.
 — v. Pratt, 17 Wend. 44. §49.
 Bragg v. Paulk, 42 Me. 502. §27.
 Braley v. Byrnes, 25 Minn. 297. §41.
 Branch v. Atlantic, etc., Ry. Co., 3 Woods, 481. §210.
 — v. Griffin, 99 N. C. 173. §154.
 Brasher v. Christopher, 10 Colo. 284. §253.
 Bratt v. Bratt, 21 Md. 578. §20.
 Bratton v. Rogers, 62 Miss. 281. §236.
 Bray v. Clapp, 80 Me. 277; s. c. 6 Am. St. Rep. 197. §186.
 Brayley v. Ellis, 71 Iowa, 155. §§33, 175.
 — v. Bymes, 25 Minn. 297. §254.
 Breckinridge v. Todd, 3 Mon. 54. §7.
 Breed v. Conley, 14 Iowa, 269; s. c. 81 Am. Dec. 485. §143.
 Breese v. Bange, 2 E. D. Smith, 474. §§28, 252.
 Brennan v. Swasey, 16 Cal. 140; s. c. 76 Am. Dec. 507. §46.
 Brewster v. Carnes, 103 N. Y. 556. §164.
 Bridgeford v. Adams, 45 Ark. 136. §211.
 Bridgman v. Wells, 13 Ohio, 43. §28.
 Brig Atlantic, Newb. 514. §275.
 Briggs v. Fleming, 112 Ind. 313. §§7, 254, 269.

- Briggs v. Hodgdon, 78 Me. 514. §176.
 — v. Leitelt, 41 Mich. 79. §41, 23.
 — v. Mette, 42 Mich. 12. §§258, 260.
 — v. Rice, 130 Mass. 50. §204.
 — v. Ripley, 37 Minn. 78. §180.
 Brigham v. Brown, 44 Mich. 59. §140.
 — v. Weaver, 6 Cush. 298. §265.
 Bright v. Boyd, 1 Story. 486. §108.
 Brinkerhoff v. Lansing. 4 Johns. Ch. 65; s. c. 8 Am. Dec. 528. §§171, 226.
 Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. 477. §§99, 102.
 Brinkley v. Tomeny, 9 Baxt. 275. §91.
 Brinkman v. Jones, 44 Wis. 498. §§182, 222, 229, 299.
 Brinley v. Mann, 2 Cush. 377; 48 Am. Dec. 669. §59.
 Brinton v. Seever, 12 Iowa, 89. §§3, 23, 97.
 Briscoe v. Ashby, 24 Gratt. 45. §§19, 43, 202, 203.
 — v. Brounagh, 1 Tex. 326. §20.
 Brittain v. Work, 13 Neb. 347. §144.
 Britton v. Janney, 21 La. Ann. 204. §173.
 — v. Norment, 20 La. Ann. 486. §173.
 Britton's Appeal, 45 Penn. St. 172. §§12, 198.
 Broach v. Smith, 75 Ga. 159. §§20, 209.
 Brock v. Barr, 70 Iowa, 399. §253.
 Brockenborough v. Melton, 55 Tex. 493. §148.
 Brogan v. Savage, 5 Sneed, 689. §124.
 Brohawn v. Van Ness, 1 Cranch C. Ct. 366. §28.
 Bronson v. Cahill, 4 McL. 19. §216.
 Brook v. Headen, 13 Ala. 370. §56.
 Brookfield v. Goodrich, 32 Ill. 363. §168.
 Brook's Appeal, 64 Pa. St. 127. §16.
 Brooks v. Chaplin, 3 Vt. 281; s. c. 23 Am. Dec. 209. §§70, 84.
 — v. Davey, 109 N. Y. 495. §43.
 — v. Lester, 36 Md. 65. §§47, 164.
 — v. Marbury, 11 Wheat. 78. §211.
 Broome v. Beers, 6 Conn. 198. §§171, 226.
 Brophy v. Brophy, 15 Nev. 101. §§209, 228.
 Brophy Co. v. B. & D. Co., 15 Nev. 101. §28.
 Brothers v. Mundell, 60 Tex. 240. §§41, 218, 234, 256, 269, 284.
 Broughton v. Foster, 69 Ga. 714. §§221, 238.
 Browell v. Curtis, 10 Paige, 217. §211.
 Brown v. Bankers, etc., Co., 30 Md. 39. §240.
 — v. Banner Coal Co., 97 Ill. 214; s. c. 37 Am. Rep. 105. §§27, 183.
 — v. Dean, 3 Wend. 213. §§31, 138.
 — v. Farron, 3 Ohio, 140. §§70, 108.
 — v. Goodwin, 75 N. Y. 409. §43.
 — v. Hanauer, 48 Ark. 551. §§4, 216.
 — v. Holmes, 13 Kan. 4^c2. §253.
 — v. Kimbrough, 55 Ga. 41. §100.
 — v. Kirkman, 1 O. St. 116. §143.
 — v. Lunt, 37 Me. 423. §§8, 64.
 — v. Manning, 6 Ohio, 298. §49.
 — v. Matthews, 3 La. Ann. 198. §28.
 — v. McCormick, 6 Watts, 60. §161.
 — v. Metz, 33 Ill. 339. §57.
 — v. Moore, 38 Tex. 645. §§35, 67.
 — v. Phil. Bank, 6 Serg. & R. 484. §§54, 66.
 — v. Pierce, 7 Wall. 205. §§192, 197.
 — v. Simons, 44 N. H. 475. §§21, 164.
 — v. Simpson, 4 Kan. 76. §§20, 23, 53.
 — v. —, 67 Tex. 225. §95.
 — v. Swift (Ky.), 1 S. W. Repr. 474. §§61, 69.
 — v. Terrell, 83 Ky. 418. §20.
 — v. Volkening, 64 N. Y. 76, 82. §§232, 233, 235, 237.
 — v. Ward, 6 Rich. Eq. 155. §203.
 — v. Webb, 20 Ohio, 389. §§41, 254.
 — v. Welch, 18 Ill. 343; s. c. 68 Am. Dec. 549. §204.

- Brownback v. Ozias, 117 Pa. St. 87, 92. §§166, 174, 178.
 Bruce v. Bonney, 12 Gray (78 Mass.), 107. §175.
 ———, *In re*, 16 Nat. B. Reg. 318. §213.
 ——— v. Nelson, 35 Iowa, 157. §§169, 175.
 ——— v. Slempe, 82 Va. 352. §144.
 Brundage v. Camp, 21 Ill. 330. §250.
 Brunson v. Brooks, 68 Ala. 248. §235.
 Brunswick v. Brackett, 37 Minn. 58. §§69, 78, 79.
 ——— v. Clay, 7 Neb. 137. §254.
 ——— v. Hoover, 95 Pa. St. 508. §250.
 Brush v. Scribner, 11 Conn. 388. §204.
 ——— v. Ware, 15 Pet. 93. §§178, 181, 216.
 Bryan v. Ramirez, 8 Cal. 461; s. c. 68 Am. Dec. 340. §§69, 81.
 Bryant v. Carsen, 3 Nev. 313; s. c. 93 Am. Dec. 403. §24.
 Brydon v. Campbell, 40 Md. 331. §§31, 146.
 Buchanan v. Balkum, 60 N. H. 406. §181.
 ——— v. Int. Bank, 78 Ill. 500. §§4, 152, 178.
 ——— v. Morgan, 7 La. Ann. 249. §158.
 Buck v. Collins, 51 Ga. 391; s. c. 21 Am. Rep. 236. §151.
 ——— v. Holloway, 2 J. J. Marsh. 163. §223.
 ——— v. Holt, 74 Iowa. 294. §233.
 ——— v. Paine, 50 Miss. 648. §221.
 Buckingham v. Hanna, 2 O. St. 551. §160.
 Buckley v. Earley, 72 Iowa, 550. §§23, 97.
 Buell v. Irwin, 24 Mich. 145. §§73, 79, 81, 82.
 Buffington v. Garrish, 15 Mass. 156. §207.
 Bugbee's Appeal, 110 Pa. St. 331. §225.
 Bugbee v. Stevens, 53 Vt. 389. §251.
 Bull v. Coe, 77 Cal. 54. §107.
 Bullard v. Long, 68 Ga. 821. §209.
 Bullock v. Battenhausen, 108 Ill. 28. §171.
 ——— v. Wallingford, 55 N. H. 619. §§140, 150.
 ——— v. Williams, 16 Pick. 33. §41.
 Bumpus v. Platner, 1 Johns. Ch. 213. §155.
 Bunting v. Jones, 78 N. C. 242. §172.
 ——— v. Ricks, 2 Dev. & B., ch. 130. §§182, 219, 222, 226.
 Bunton v. Cardwell, 53 Tex. 408. §234.
 ——— v. Palm (Tex.), 9 S. W. Repr. 182. §242.
 Buntyn v. Shippers' Co., 63 Miss. 94. §52.
 Burbank v. Crocker, 7 Gray, 158. §219.
 Burch v. Jones (Ky.), 5 S. W. Repr. 408. §117.
 Burditt v. Hunt, 25 Me. 419. §253.
 Burhans v. Hutcheson, 25 Kan. 625. §204.
 Burke v. Abbott, 103 Ind. 1; s. c. 57 Am. Rep. 474. §169.
 ——— v. Adams, 80 Mo. 504; s. c. 50 Am. Rep. 510. §144.
 ——— v. Anderson, 40 Ga. 535. §17.
 ——— v. Elliott, 4 Ind. 355. §64.
 Burkett v. Scarborough, 59 Tex. 496. §§107, 110.
 Burley v. Marsh, 11 Neb. 291. §41.
 Burn v. Burn, 3 Ves. 582. §§10, 192, 212.
 Burnham v. Brennan, 42 N. Y. Sup. Ct. 51. §219.
 Burnhart v. Greenshields, 9 Moore's P. C. C. 36. §224.
 Burns v. Berry, 42 Mich. 176. §31.
 ——— v. McGregor, 90 N. C. 222. §117.
 Burt v. Batavia Paper Co., 86 Ill. 66. §244.
 ——— v. Cassety, 12 Ala. 734. §12.
 ——— v. Wilson, 28 Cal. 632. §20.
 Burwell v. Fauber, 21 Gratt. 446. §181.
 Busenborke v. Ramey, 53 Ind. 499. §§203, 209.
 Bush v. Golden, 17 Conn. 594. §§19, 48, 232.
 ——— v. Lathrap, 22 N. Y. 539. §155.
 Bushell v. Bushell, 1 Sch. & L. 90. §2.
 Bussing v. Crane, 8 B. Mon. 593. §151.
 Butcher v. Yocum, 61 Pa. St. 168; s. c. 100 Am. Dec. 625. §§216, 224.
 Butler v. Barclay, 61 Iowa, 491. §183.

- Butler v. Buckingham**, 5 Day, 492; s. c. 5 Am. Dec. 174. §§9, 98.
 — v. Douglass, 1 McCrary, 630. §202.
 — v. Dunagan, 19 Tex. 565. §§63, 97, 190.
 — v. Maury, 10 Humph. 420. §§88, 194, 196.
 — v. Stevens, 26 Me. 484. §§38, 225, 233, 235.
 — v. Viele, 44 Barb. 166. §12.
Butt v. Broughton, 72 Ala. 294. §117.
Butte v. Sullivan, 7 Mont. 307. §271.
Butterfield v. Beale, 3 Ind. 203. §105.
Butters v. Haughwout, 42 Ill. 18; s. c. 89 Am. Dec. 401. §154.
Button v. Rathbone, 43 Hun. 137. §§196, 254.
Buttrick v. Holden, 3 Met. 335. §223.
Butts v. Norcross, 14 Pick. 224. §§158, 182.
Bybee v. Hawkett, 12 Fed. Repr. 649. §§207, 209.
Byer v. Entyre, 2 Gilman (Ill.), 150; s. c. 41 Am. Dec. 410. §71.
Byers v. Engles, 16 Ark. 543. §228.
Byler v. Johnson, 45 Tex. 509. §163.
Byles v. Tome, 39 Md. 461. §§33, 175.
Bynum v. Carter, 4 Ired. 310. §233.
Byram v. Gordon, 11 Mich. 531. §253.
Byrd v. Wilcox, 8 Baxt. 65. §166.
 — v. Wilkinson, 4 Leigh. 266. §139.
Byrne v. Fagan, 19 Tex. 891. §96.
- C.**
- Cabell v. Grubbs**, 48 Mo. 353. §81.
Cabeen v. Breckinridge, 48 Ill. 91, 95. §§15, 156.
Cady v. Whaling, 7 Biss. 434. §211.
Cahall v. Citizen's Association, 61 Ala. 233. §§92, 119.
Cabill v. Palmer, 45 N. Y. 484. §235.
Cahoon v. Miers, 67 Md. 573. §24.
Cain v. Cox, 23 W. Va. 594. §216.
Cairrell v. Higgs, 1 Tex. Un. Cas. 56. §§123, 127, 130.
Cake's Appeal, 23 Pa. St. 186. §172.
- Calais v. Scudder**, 2 Black. 372. §203.
Calder v. Chapman, 52 Pa. St. 359. §§22, 31, 158, 160, 199.
Caldwell v. Bowen, 4 Sneed, 415. §210.
 — v. Carrington, 9 Pet. 86. §203.
 — v. Center, 30 Cal. 539; s. c. 87 Am. Dec. 131. §§49, 149.
 — v. Head, 17 Mo. 561. §184.
 — v. Trowbridge, 68 Iowa, 150. §253.
 — v. Woods, 3 Watts, 197. §231.
Caldwell's Appeal (Pa.), 7 Atl. Repr. 211. §116.
Call v. Gray, 37 N. H. 428; s. c. 75 Am. Dec. 141. §254.
 — v. Seymour, 40 O. St. 670. §249.
Callaway v. Fash, 50 Mo. 420. §76.
Calumet Co. v. Russell, 68 Ill. 426. §82.
Calvert v. Fitzgerald, Little's Sel. Cases, 388. §69.
 — v. Roche, 59 Tex. 463. §199.
Cambridge Bank v. Delano, 48 N. Y. 326. §§152, 178, 181, 182, 219.
Cameron v. Hull, 26 Kan. 622. §218.
 — v. Marshall, 65 Tex. 7. §45.
Campbell's Appeal, 36 Pa. St. 247; s. c. 78 Am. Dec. 375. §§45, 172.
 — v. Brackenridge, 8 Blackf. 471. §296.
 — v. Moon, 16 S. Car. 107. §§111, 186.
 — v. Roach, 45 Ala. 667. §§181, 205, 216.
 — v. Vedder, 3 Keves, 174. §33.
 — v. Walker, 114 N. Y. 7. §431.
 — etc., Co. v. Walker, 22 Fla. 412. §219.
Canal Boat Independence, 9 Ben. 395. §257.
Canal Co. v. Russell, 68 Ill. 426. §§90, 216.
Cannon v. Boutwell, 53 Tex. 626. §117.
Caraway v. Caraway, 27 S. Car. 576. §194.
Carey v. White, 52 N. Y. 138. §§204, 209.
Card v. Patterson, 5 O. St. 319. §110.
Carlisle v. Carlisle, 78 Ala. 542. §85.
Carli v. Rhuer, 27 Minn. 293. §64.

- Carmichael v. Buck, 10 Rich. 332; s. c. 70 Am. Dec. 226. §247.
- Carn v. Haisley, 22 Fla. 317. §119.
- Carnall v. Duval, 22 Ark. 136. §§29, 144.
- Carnis v. Jones, 5 Yerg. 249. §196.
- Carnog v. Fuller, 30 Iowa, 212. §33.
- Carpenter v. Allen, 16 La. Ann. 435. §229.
- v. Carpenter, 30 Kan. 712. §121.
- v. Dexter, 8 Wall. 513. §§23, 56, 66, 69, 70, 76, 125, 128.
- v. Hall, 83 Ala. 171. §55.
- Carr v. Hobbs, 11 Md. 285. §20.
- v. Wallace, 7 Watts, 394. §226.
- Carrier v. Hampton, 11 Ired. 307. §§122, 128, 130, 188.
- Carroll v. Johnston, 2 Jones' Eq. 120. §205.
- Carson v. Phelps, 40 Md. 73. §§19, 36, 139.
- v. Raisback, 3 Wash. 168. §97.
- Carter v. Campion, 8 Conn. 549. §§126, 127, 145.
- v. Chandron, 21 Ala. 72. §52.
- v. Corley, 23 Ala. 612. §§93, 127.
- v. Hallihan, 61 Ga. 314. §281.
- v. Hawkins, 62 Tex. 393. §147.
- v. Le Grange, 60 Tex. 638. §236.
- v. Strapham, Cowp. 201. §§102, 119.
- Caruthers v. Eldredge, 12 Gratt. 670. §95.
- v. McLaran, 56 Miss. 371. §83.
- Case v. Burnstead, 24 Ind. 429. §§37, 200.
- v. Hargadine, 43 Ark. 144. §§16, 254.
- v. Jennings, 17 Tex. 662. §§205, 247.
- v. Jewett, 13 Wis. 498; s. c. 80 Am. Dec. 752. §§256, 257.
- Co. v. Campbell, 14 Or. 460. §258.
- Threshing Co. v. Smith, 16 Or. 381. §258.
- Casey v. Inloes, 1 Gill, 430; s. c. 39 Am. Dec. 658. §181.
- Cashman v. Henry, 75 N. Y. 103. §100.
- Cass v. Gunnison, 58 Mich. 108. §253.
- Cassell v. Cooke, 8 Serg. & R. 268; s. c. 11 Am. Dec. 610. §71.
- Catlin v. Bennett, 47 Tex. 166. §196.
- v. Douglass, 33 Fed. Repr. 569. §46.
- v. Ware, 9 Mass. 218. §56.
- Cavazos v. Trevino, 35 Tex. 134. §175.
- Cave v. Cave, L. R., 15 Ch. D. 639. §243.
- Cavitt v. Archer, 52 Tex. 166. §82.
- Center v. Bank, 22 Ala. 743. §196.
- Central Bank v. Copeland, 18 Md. 305; s. c. 81 Am. Dec. 597. §§89, 90.
- Investment Co. v. Wabash, 29 Fed. Repr. 546. §147.
- Cessna's Appeal (Pa.), 10 Atl. Repr. 1. §15.
- Chadwick v. Baker, 54 Me. 9. §275.
- v. Turner, 34 Beav. 634. §50.
- Chaffe v. Halpin, 62 Miss. 1. §§13, 144, 166, 195.
- v. Heyner, 31 La. Ann. 591. §266.
- v. Oliver, 39 Ark. 531. §108.
- v. Walker, 39 La. Ann. 35. §42.
- Chamberlain v. Bell, 7 Cal. 292; s. c. 68 Am. Dec. 260. §§93, 147, 150.
- v. Smith, 8 Wright (44 Pa. St.), 431. §§248, 250.
- v. Spargur, 86 N. Y. 603; s. c. 22 Hun. 437. §§48, 54, 161, 165, 166, 196, 218.
- Chamblee v. Tarbox, 27 Tex. 140. §57.
- Chance v. McWhorter, 26 Ga. 315. §207.
- Chandler v. Burnham, 15 Tex. 441. §245.
- v. Chandler, 55 Cal. 267. §1.
- v. Spear, 22 Vt. 388. §§18, 57, 78, 234.
- Chapin v. Cram, 40 Me. 561. §149.
- Chapman v. Beardsley, 31 Conn. 115. §§20, 29.
- v. Coats, 26 Iowa. 291. §199.
- v. Gray, 15 Mass. 439. §28.
- v. Hamilton, 19 Ala. 121. §226.
- v. Holding, 60 Ala. 522. §216.
- v. Miller, 130 Mass. 289. §§30, 209.

- Chapman v. Sims, 53 Miss. 163. §§83, 274.
 Charauleau v. Woffenden, 1 Ariz. 243. §114.
 Charivin v. Wagner, 18 Mo. 541. §106.
 Charle v. Saffold, 13 Tex. 112. §234.
 Charles v. Claggett, 3 Md. 82. §§139, 271.
 Charleston v. Ryan, 22 S. Car. 339; s. c. 53 Am. Rep. 713. §175.
 Chase v. Ingall, 122 Mass. 381. §249.
 Chatham v. Bradford, 50 Ga. 327. §142.
 Chauncey v. Arnold, 24 N. Y. 330. §146.
 Chaytor v. Brunswick, 71 Tex. 591. §§246, 261.
 Cheek v. Bellows, 17 Tex. 613. §118.
 Cheever v. Fair, 5 Cal. 337. §164.
 Chemical Co. v. Johnson, 98 N. C. 123; s. c. 3 S. E. Repr. 723. §251.
 Chester v. Greer, 5 Humph. 26. §§196, 226.
 — v. Rumsey, 26 Ill. 97. §83.
 Chestnut v. Shane, 16 Ohio, 599. §§57, 104, 105, 107, 120.
 Cheval v. Nichols, 1 Stra. 664. §216.
 Chew v. Barnett, 11 S. & R. 389. §203.
 Chicago, B. & Q. Ry. v. Lewis, 4 N. W. Repr. 842. §91.
 — v. Hay, 119 Ill. 493. §233.
 — v. Witt, 75 Ill. 211. §§159, 224, 225.
 Child v. Baker, 24 Neb. 188. §127.
 Childs v. Stoddard, 130 Mass. 610. §175.
 Chilton v. Braidon, 2 Black. 458. §20.
 Chiniquy v. Catholic Bishop, 41 Ill. 148. §§57, 70.
 Chinn v. Taylor, 64 Tex. 385. §177.
 Chipman v. Tucker, 38 Wis. 43; s. c. 20 Am. Rep. 1. §154.
 Chipron v. Feikert, 68 Ill. 284. §§41, 254.
 Chivington v. Colo. Co., 9 Colo. 597. §52.
 Choteau v. Jones, 11 Ill. 300. §§8, 14, 169.
 — v. Thompson, 2 O. St. 114. §149.
 Chouteau v. Allen, 70 Mo. 290. §§80, 83.
 Christian v. Clark, 10 Lea, 630. §§169, 170.
 Christy v. Burch (Fla.), 2 South. Repr. 258. §189.
 Church v. Church, 1 Casey, 278. §155.
 — v. Ruland, 64 Pa. St. 432. §155.
 Churchill v. Moore, 1 R. I. 209. §110.
 Cirode v. Buchanan, 22 Gratt. 205. §43.
 City Bank v. Goodrich, 3 Colo. 139. §207.
 City Council v. Page, Speer's Eq. 159. §§28, 155.
 — v. Ryan, 22 S. Car. 339. §34.
 City Nat. Bank's Appeal, 91 Pa. St. 160. §172.
 — v. Dayton, 116 Ill. 257. §198.
 Citizen's Bank v. Terry, 32 La. Ann. 310. §131.
 Clabough v. Byerly, 7 Gill. 354. §§153, 171, 178, 220.
 Clafin v. Duncan, 74 Ga. 348. §§182, 223.
 Claiborne v. Holmes, 51 Miss. 146. §§7, 132, 236.
 Clamorgan v. Lane, 9 Mo. 446. §§38, 140.
 Clapp v. Bromaghan, 9 Cow. 552. §234.
 — v. Halliday, 48 Ark. 259. §52.
 — v. Nordmeyer, 25 Fed. Repr. 71. §211.
 — v. Trowbridge, 74 Iowa 550. §253.
 Clark v. Akers, 16 Kan. 166. §144.
 — v. Arnold, 2 Hay, 287. §132.
 — v. Barnes, 72 Iowa, 563. §207.
 — v. Bosworth, 51 Me. 528. §229.
 — v. Bullard, 66 Iowa, 747. §§169, 180.
 — v. Butler, 32 N. J. Eq. 664. §45.
 — v. Connor, 28 Iowa, 311. §191.
 — v. Courtney, 5 Pet. 319. §§59, 234.
 — v. Finlon, 90 Ill. 245. §231.
 — v. Flint, 22 Pick. 231; s. c. 33 Am. Dec. 733. §§207, 211.
 — v. Fulton, 39 Conn. 238. §239.

- Clark v. Graham, 6 Wheat. 577. §145.
 — v. Holland, 72 Iowa, 34. §§158, 159, 160, 172, 223.
 — v. Mackin, 30 Hun, 411. §33.
 — v. Monroe, 14 Mass. 351. §172.
 — v. Reins, 12 Gratt. 103. §117.
 — v. Tarbell, 58 N. H. 88. §268.
 — v. Troy, 20 Cal. 219. §56.
 — v. Tucker, 6 Vt. Sl. §54.
 — v. Voorhes, 36 Kan. 144. §253.
 — v. Watson, 141 Mass. 248. §176.
 — v. White, 12 Pet. 178, 197. §54, 132, 166.
 — v. Wilson, 127 Ill. 449. §85.
 Clay v. Holbert, 14 Tex. 189. §96.
 Clayton v. Frazier, 33 Tex. 92. §102.
 — v. Rose, 87 N. C. 106. §§9, 105.
 Clement v. Bartlett, 33 N. J. Eq. 43. §200.
 Clements v. Ewing, 71 Tex. 370. §42, 118.
 — v. Pearce, 63 Ala. 284. §125.
 Clemons v. Elder, 9 Iowa, 273. §31, 137.
 Clevinger v. Ross, 109 Ill. 349. §231.
 Clift v. Stockdon, 4 Litt. 215. §28.
 Cline v. Upton, 56 Tex. 319. §114.
 Close v. Close, 28 N. J. Eq. 472. §42.
 Clouse v. Elliott, 72 Ind. 302. §222.
 Cluder v. Thomas, 89 Pa. St. 343. §136.
 Coal Co. v. Pasco, 79 Ill. 170. §93.
 Coal Creek Co. v. Heck, 83 Tenn. (15 Lea), 497. §§92, 120, 163.
 Cobb v. Buswell, 37 Vt. 337. §266.
 — v. Chase, 54 Iowa, 253. §256.
 — v. Dyer, 69 Me. 495. §175.
 Coble v. Nonenmaker, 78 Pa. St. 501. §269.
 Coburn v. Herrington, 114 Ill. 104. §§76, 113.
 Cocke v. Brogan, 5 Ark. 693. §161.
 — v. Halsey, 16 Pet. 71. §64.
 Cockey v. Milne, 16 Md. 200. §271.
 Coe v. Ry. Co., 10 O. St. 372. §171.
 Coffey v. Hendricks, 66 Tex. 676. §71, 74.
 Cogan v. Cook, 22 Minn. 137. §§32, 154.
 Coggell v. Hartford, 3 Gray (39 Mass.), 545. §249.
 Coggeshall v. Potter, 1 Holmes, 75; s. c. 4 N. B. Reg. 73. §213.
 Coggsweil v. Griffith, 23 Neb. 334. §155.
 — v. Stout, 32 N. J. Eq. 240. §164.
 Cohen v. Chandler, 79 Ga. 427. §261.
 Colby v. Kenniston, 4 N. H. 262. §235.
 — v. McOmber, 71 Iowa, 469. §71.
 Cole v. Bammel, 62 Tex. 108. §§105, 117.
 — v. Berry, 42 N. J. L. (13 Vroom), 308. §249.
 — v. Kerr, 19 Neb. 553. §273.
 — v. Mann, 62 N. Y. 1. §24, 250.
 — v. Raymond, 9 Gray, 217. §161.
 — v. Wright, 70 Ind. 179. §73.
 Coleman v. Barklew, 27 N. J. L. 357. §§13, 166, 233.
 — v. Billings, 89 Ill. 183. §103.
 — v. Carhart, 74 Ga. 392. §168.
 — v. Coleman, 37 La. Ann. 566. §118.
 — v. State, 79 Ala. 49. §127.
 Coles v. Berryhill, 37 Minn. 58. §§25, 191, 194.
 Collier v. Huson, 34 N. J. Eq. (7 Stew.), 38. §170.
 Collins v. Boyd, 5 Dana, 316. §73.
 — v. Cook, 40 Tex. 238. §154.
 — v. Cooper, 65 Tex. 460. §242.
 — *In re*, 12 Blatch. 548. §211.
 — v. Miller, 64 Tex. 118. §212.
 Colomer v. Morgan, 13 La. Ann. 202. §136.
 Colton v. Scavey, 22 Cal. 496. §65.
 Columbia Bank v. Jacobs, 10 Mich. 349. §§16, 32, 44, 154.
 Columbus Buggy Co. v. Graves, 108 Ill. 459. §194.
 Comer v. Cunningham, 77 N. Y. 391. §§247, 250.
 Compton v. Bunker Hill Bank, 96 Ill. 301; s. c. 36 Am. Rep. 147. §108.
 Commissioners v. Wood, 10 Pa. St. 93; s. c. 49 Am. Dec. 582. §49.
 Commonwealth v. Moorehead, 118 Pa. St. 344; s. c. 4 Am. St. Rep. 599. §49.

- Conder v. Holliman, 71 Ga. 93. §251.
- Condit v. Wilson, 36 N. J. Eq. (9 Stew.), 370. §§199, 212.
- Congar v. C. & N. W. Ry. Co., 24 Wis. 157. §244.
- Conklin v. Bush, 8 Pa. St. 517. §119.
- v. Shelley, 28 N. Y. 360; s. c. 84 Am. Dec. 348. §253.
- Conlan v. Grace, 36 Minn. 281. §144.
- Conlee v. McDowell, 15 Neb. 184. §236.
- Conley v. Campbell, 78 Ga. 369. §127.
- Connelly v. Bowie, 6 Har. & J. 141. §§70, 71.
- Conner v. Boutwell, 53 Tex. 627. §117.
- v. Whitmore, 52 Me. 185. §175.
- Connihan v. Thompson, 111 Mass. 270. §216.
- Connolly v. Branstler, 3 Bush, 702. §99.
- Connor v. Stanley, 65 Cal. 183. §204.
- Constant v. Am. Society, 53 N. Y. Sup. Ct. 170. §241.
- Converse v. Blumrich, 14 Mich. 109; s. c. 90 Am. Dec. 290. §219.
- v. Porter, 45 N. H. 400. §16.
- Conway v. Cook, 66 Md. 290. §§45, 239.
- Cooke v. Bremond, 27 Tex. 457. §§114, 177.
- Cook v. Dillon, 9 Iowa, 407. §§163, 164.
- v. Hager, 3 Colo. 386. §§65, 262, 263.
- v. Hall, 6 Ill. (1 Gilm.), 575. §148.
- v. Halsell, 65 Tex. 1. §256.
- v. McChristian, 4 Cal. 23. §§40, 188.
- v. Parham, 63 Ala. 456. §209.
- v. Parhawe, 63 Ala. 476. §30.
- v. Stone, 63 Iowa. 352. §33.
- v. Travis, 20 N. Y. 400. §§4, 155.
- Cool v. Roche, 20 Neb. 550. §§246, 265.
- Cooley v. Gillan, 54 Conn. 80. §249.
- Coombes v. Thomas, 57 Tex. 321. §§79, 80, 105.
- Cooper v. Bigley, 13 Mich. 463. §§21, 163.
- v. Blakey, 10 Ga. 263. §199.
- v. Brock, 41 Mich. 488. §255.
- v. Koppes, 45 O. St. 620. §§246, 257, 258.
- v. Newton, 45 N. H. 339. §247.
- Coover v. Johnson, 86 Mo. 533. §251.
- Copeland v. Bosquet, 4 Wash. C. Ct. 588. §249.
- Coppin v. Fernyhough, 2 Bro. C. C. 291. §181.
- Corbin v. Kincaid, 33 Kan. 649. §§170, 253.
- v. Sullivan, 47 Ind. 356. §162.
- Corbitt v. Clenny, 52 Ala. 480. §181.
- Cordevielle v. Dawson, 26 La. Ann. 534. §§31, 138.
- Cordier v. Cage, 44 Tex. 532. §57.
- Cordova v. Hood, 17 Wall. 1. §§181, 216.
- Corlies v. Howland, 26 N. J. Eq. 311. §20.
- Corliss v. Corliss, 8 Vt. 475. §28.
- Corn v. Sims, 3 Met. 391. §§36, 38.
- Corning v. Murray, 3 Barb. 652. §§167, 171.
- Correy v. Caxton, 4 Binn. 140. §35.
- Coryelle v. Holmes, 3 Tex. Law Jour. 481. §126.
- Coster v. Peters, 7 Robt. 386. §191.
- Coster's Executors v. Bank of Ga., 24 Ala. 37. §§13, 155, 166, 170.
- Cothay v. Sydenham, 2 Bro. Ch. 291. §223.
- Cotton v. Marsh, 3 Wis. 221. §41.
- Couch v. Sutton, 1 Grant's Cas. 114. §99.
- Coulson v. Walton, 9 Pet. 62. §95.
- Council Bluffs v. Billups, 67 Iowa 674. §171.
- Courtis v. Crane, 32 Vt. 232; s. c. 76 Am. Dec. 174. §247.
- Cover v. Black, 1 Pa. St. 493. §§10, 25.
- v. Manaway, 115 Pa. St. 338; s. c. 2 Am. St. Rep. 552. §§69, 84, 90, 144.
- Cowan v. Beall, 1 MacArth. 270. §§61, 65.
- v. Williams, 49 Tex. 381. §96.
- Coward v. Culver, 12 Heisk. 541. §§189, 268.

- Cowardin v. Anderson, 78 Va. 88. §§196, 197, 218.
- Cowdry v. Vanderburg, 101 U. S. 572. §247.
- Cowen v. Loomis, 91 Ill. 132. §234.
- Cowles v. Hardin, 91 N. C. 231. §187.
- Cox v. Gill, 83 Ky. 669. §§87, 90, 97, 101, 102.
- v. Wayt, 26 W. Va. 807. §§55, 196.
- Craddock v. Merrill, 2 Tex. 495. §§8, 155.
- Craig v. Cartwright, 65 Tex. 413. §§12, 234, 414.
- v. Dimock, 47 Ill. 308. §255.
- v. Leiper, 2 Yerg. 193; s. c. 24 Am. Dec. 479. §§19, 203.
- v. Zimmerman, 87 Mo. 475; s. c. 56 Am. Rep. 466. §§27, 183.
- Crandall v. Brown, 18 Hun, 461. §254.
- Crane v. Chandler, 3 Colo. 21. §§246, 269.
- v. Reeder, 21 Mich. 60. §145.
- v. Turner, 7 Hun, 357; s. c. 67 N. Y. 437. §§22, 155, 159, 160, 179.
- Crassen v. Swoveland, 22 Ind. 427. §§222, 223, 231.
- Crawford v. Burton, 6 Iowa, 476. §71.
- Crenshaw v. Julian, 26 S. Car. 283; s. c. 4 Am. St. Rep. 719. §99.
- Crews v. Taylor, 56 Tex. 461. §§16, 18, 77.
- Crippen v. Fletcher, 56 Mich. 386. §254.
- Criscoe v. Hambrick, 47 Ark. 235. §§54, 186.
- Crisfield v. Neal, 36 Kan. 278. §253.
- Crispen v. Hannavan, 50 Mo. 536. §235.
- Crocker v. Crocker, 31 N. Y. 507. §§40, 226.
- v. Gillespie, 44 Me. 491; s. c. 69 Am. Dec. 118. §249.
- Crockett v. Campbell, 2 Humph. 411. §124.
- v. Maguire, 10 Mo. 34. §162.
- Crofton v. Ormsby, 2 Sch. & Lef. 583. §228.
- Crosby v. Baker, 6 Allen (88 Mass.), 295. §274.
- v. Huston, 1 Tex. 203, 239. §§134, 210, 262, 267.
- Crosby v. Vleet, 3 N. J. Law, 86. §§19, 57, 78.
- Cross v. Evarts, 28 Tex. 502. §§101, 110, 117.
- Crowley v. Wallace, 12 Mo. 143. §83.
- Crowning v. Belin, 10 B. Mon. 386. §150.
- Crum v. Brown, 63 Miss. 495. §121.
- Crumbaugh v. Kugler, 2 O. St. 373. §65.
- Cryer v. Andrews, 11 Tex. 170. §216.
- Cucullu v. Hernandez, 103 U. S. 105. §173.
- Culbertson v. Witbeck Co., 127 U. S. 326. §§77, 125, 145.
- Cullers v. Henry, 66 Tex. 497. §118.
- Cummings v. Tovey, 39 Iowa, 195. §285.
- Cunningham v. Brown, 44 Wis. 72. §221.
- v. Pattee, 99 Mass. 248, 252. §236.
- v. Tucker, 14 Fla. 251. §276.
- v. Woodbridge, 76 Ga. 302. §§221, 239.
- Currie v. Rauh, 100 Ind. 247. §245.
- Currie v. Kerr, 11 Lea (Tenn.), 138. §52.
- Curtis v. Blair, 4 Cush. 309. §§182, 223.
- v. Hunting, 6 Iowa, 536. §25.
- v. Leavitt, 15 N. Y. 194. §23.
- v. Lunn, 6 Munf. 42. §155.
- v. Millard, 14 Iowa, 128. §26.
- v. Mundy, 3 Met. (44 Mass.), 405. §§222, 223, 224.
- v. Root, 20 Ill. 53. §§122, 169.
- Curts v. Cissna, 7 Biss. 260. §206.
- Cushing v. Ayer, 25 Me. 383. §6.
- v. Hurd, 4 Pick. 252; s. c. 16 Am. Dec. 335. §223.
- Cutler v. James, 64 Wis. 173; s. c. 54 Am. Rep. 603. §§27, 185.

D.

- Dail v. Moore, 51 Mo. 589. §§59, 73.
- Dailey v. Warren, 80 Va. 512. §245.
- Dakes v. Jones, 6 Jones, 14. §139.
- Dale v. Arnold, 2 Bibb. 605. §132.
- Dalton v. Rust, 22 Tex. 134. §102.

- Dame v. Baldwin, 8 Mass. 521. §§247, 248.
- Dana v. The U. S. Bank, 5 Watts & Serg. 223. §128.
- Danbury v. Robinson, 1 McCart. 213; s. c. 82 Am. Dec. 244. §§202, 216.
- Danglade v. Elias, 80 Cal. 65. §118.
- Daniels v. Davidson, 16 Beav., Sr., 249. §§210, 228, 236.
- Dargin v. Becker, 10 Iowa, 571. §147.
- Darland v. Levins (Wash.), 20 Pac. Repr. 309. §268.
- Darling v. Wilson, 60 N. H. 59. §24.
- Darst v. Bates, 51 Ill. 439. §144.
- v. Gale, 83 Ill. 136. §§35, 67.
- Daubenspeck v. Platt, 22 Cal. 330. §231.
- Daughaday v. Paine, 6 Minn. 443. §20.
- Davar v. Cardwell, 27 Ind. 4. §§79, 80.
- Davenport v. Turpen, 41 Cal. 100. §191.
- Davidson v. Cowan, 1 Dev. Eq. 470. §§14, 196.
- v. Gorham, 6 Cal. 343. §275.
- v. Little, 22 Pa. St. 245; s. c. 60 Am. Dec. 81. §204.
- Davie v. McDonald, 47 Ga. 195. §133.
- Davis v. Agnew, 67 Tex. 206. §§9, 98, 101, 110.
- v. Alvord, 94 U. S. 545. §46.
- v. Andrews, 30 Vt. 681. §100.
- v. Bk. of U. S., 2 Hill, 451. §243.
- v. Beasley, 75 Va. 491. §67.
- v. Bilsland, 18 Wall. 659. §45.
- v. Bogle, 11 Heisk. 315. §77.
- v. Demming, 12 W. Va. 246, 282. §231.
- v. Gaines, 104 U. S. 386. §§51, 191, 212.
- v. Higgins, 91 N. C. 382. §§122, 129, 130.
- v. Hopkins, 15 Ill. 519. §12.
- v. Inscoe, 84 N. C. 396. §§189, 217.
- v. Jewett, 3 Greene, 226. §171.
- Davis v. Kennedy, 58 Tex. 516. §89.
- v. Life Ins. Co., 84 Ill. 508. §43.
- v. Living, 32 W. Va. 174. §59.
- v. Lofton, 6 Tex. 489. §261.
- v. Lutkieweis, 72 Iowa, 254. §§160, 223.
- v. Ownsby, 14 Mo. 170; s. c. 55 Am. Dec. 105. §199.
- v. Roosevelt, 53 Tex. 305. §73.
- v. Strathmore, 16 Ves. 419. §§42, 216.
- Davison v. Bloomer, 1 Dall. 123. §130.
- Davy v. Littlejohn, 2 Ired. Eq. 495. §196.
- Daws v. Craig, 62 Iowa, 515. §§33, 175.
- Dawson v. Danbury, 15 Mich. 489. §230.
- v. Meade, 71 Iowa, 295. §43.
- v. Shirley, 6 Blackf. 531. §§99, 104.
- Day v. Adams, 45 Vt. 510. §127.
- v. Clark, 25 Vt. 397, 402. §§22, 156, 157.
- v. Griffith, 15 Iowa, 104. §§144, 256.
- v. Munson, 14 O. St. 488. §258.
- v. Walmsey, 33 Ind. 145. §241.
- Dayton v. People's Sav. Bk., 23 Kan. 421. §28.
- Deal v. Palmer, 72 N. C. 582. §217.
- Dean v. De Lezardi, 24 Miss. 424. §31.
- v. Hutchinson, 40 N. J. Eq. (13 Stew.), 83. §252.
- v. Long, 122 Ill. 447. §§178, 181, 221.
- v. Nelson, 10 Wall. 158. §250.
- v. Scott, 67 Iowa, 233. §20.
- De Arnaz v. Escandon, 59 Cal. 486. §§57, 89, 104, 105.
- Deason v. Taylor, 53 Miss. 697. §§181, 216, 227.
- Deatherage v. Woods, 37 Kan. 59. §§46, 271.
- Decker v. Boice, 19 Hun, 152. §§33, 170, 174.
- v. Clarke, 26 N. J. Eq. 163. §28.

- De Courcey v. Collins, 21 N. J. Eq. 357. §§166, 262.
- Deere v. Nelson, 73 Iowa, 186. §144.
- Deery v. Cray, 5 Wall. 795, 806. §§50, 80, 105.
- DeHaven's Appeal, 38 Pa. St. 373. §54.
- Deininger v. McConnell, 41 Ill. 228. §§97, 168, 169.
- Delafield v. Bradley, 108 N. Y. 524. §118.
- Delancy v. McKeen, Wash. C. Ct. 525. §§3, 134.
- DeLancy v. Stearns, 66 N. Y. 157. §203.
- Delane v. Moore, 14 How. 253. §§132, 266.
- Delespine v. Campbell, 52 Tex. 4. §178.
- Delop v. Windsor, 26 La. Ann. 185. §266.
- Demarest v. Wyncoop, 3 Johns. Ch. 129; s. c. 8 Am. Dec. 427. §154.
- Den v. Geiger, 4 Halst. (9 N. J. Law), 233. §§104, 108.
- v. Lewis, 8 Ired. 70; s. c. 47 Am. Dec. 338. §98.
- v. Richman, 13 N. J. L. (1 Green), 43. §§133, 167, 212.
- v. Roberts, 4 N. J. L. 315. §31.
- Denn v. Reid, 10 Pet. 524. §97.
- Dengenhart v. Cracraft, 36 O. St. 519. §§97, 108.
- Denham v. Hollman, 26 Ga. 191. §286.
- Dennis v. Tarpenny, 20 Barb. 371. §§104, 109.
- Denny v. Bennett, 128 U. S. 489. §267.
- v. Faulkner, 22 Kan. *89. §268.
- v. Lincoln, 13 Met. 200. §218.
- Denton v. White, 26 Wis. 679. §230.
- Dentzel v. Waldie, 30 Cal. 138. §§97, 102, 120.
- Derbes v. Romero, 32 La. Ann. 283. §§173, 196, 217.
- Derr v. Dellinger, 75 N. C. 300. §§38, 217.
- De Saint Germain v. Wind, 3 Wash. 189. §249.
- De Segond v. Culver, 10 Ohio, 188. §§66, 75.
- Deshon v. Bigelow, 8 Gray, 159. §249.
- De Sepulveda v. Baugh, 74 Cal. 468; s. c. 5 Am. St. Rep. 455. §§178, 181.
- De St. Romes v. Blanc, 31 La. Ann. 48. §173.
- Deuster v. McCamus, 14 Wis. 509. §164.
- DeVandell v. Hamilton, 27 Ala. 156. §§10, 199.
- De Veaux v. Fosbender, 57 Mich. 579. §27.
- Devinney v. Reynolds, 1 Watts & S. (Pa.), 328. §82.
- Devlin v. O'Neill, 6 Daly, 305. §250.
- Dewey v. Campan, 4 Mich. 565. §§5, 57, 80, 104, 105, 111.
- v. Ingersoll, 42 Mich. 17. §164.
- DeWolf v. Strader, 26 Ill. 231. §31.
- Dey v. Dunham, 2 Johns. Ch. 182. §§12, 31, 137, 138, 180.
- De Yampert v. Brown, 28 Ark. 166. §158.
- Dick v. Balch, 8 Pet. 30. §171.
- Dickerson v. Bowers, 42 N. J. Eq. 295. §§151, 238.
- v. Colgrove, 100 U. S. 578. §§27, 183.
- v. Davis, 12 Iowa, 353. §82.
- v. Talbot, 14 B. Mon. 60. §65.
- v. Tillinghast, 4 Paige, 215; s. c. 25 Am. Dec. 528. §§204, 205, 207, 209, 212.
- Dickey v. Henarie, 15 Or. 351. §198.
- v. Lyon, 19 Iowa, 544. §236.
- Dickson v. Hynes, 36 La. Ann. 684. §192.
- Digby v. Jones, 67 Mo. 104. §177.
- Digman v. McCollum, 47 Mo. 372. 376. §§4, 22, 159, 161.
- Dillingham v. Bolt, 37 N. Y. 198; s. c. 4 Abb. Pr. N. S. 221. §§257, 260.
- v. Ladue, 35 Barb. 38. §257.
- Dillon v. Shugar, 73 Iowa. 434. §216.
- Dimon v. Dunn, 15 N. Y. 498. §171.
- Dingens v. Clancey, 56 Barb. 566. §99.
- Dinkins v. Moore, 17 Ga. 64. §§8, 52.
- Disque v. Wright, 49 Iowa, 538. §§17, 147.
- Dixon v. Caldwell, 15 O. St. 412; s. c. 86 Am. Dec. 487. §247.
- v. Cook, 47 Miss. 226. §195.
- v. Doe, 1 Sm. & M. 70. §198.

- Dixon v. Hunter, 57 Ind. 278. §§33, 134, 209.
- Dobbins v. Stevens, 1 Dev. & Bat. L. 6. §234.
- Dobyns v. Waring, 82 Va. 159. §§10, 196, 197, 218.
- Dodd v. Arnold, 28 Tex. 98. §247.
- v. Bowles, 3 Wash. 383. §493.
- v. Parker, 40 Ark. 536, 540. §§12, 30, 165, 189, 196, 217.
- Dodds v. Neel, 41 Ark. 70. §273.
- Dodge v. Briggs, 27 Fed. Repr. 160. §99.
- v. Evans, 43 Miss. 570. §20.
- v. Hollingshead, 6 Minn. 25; s. c. 80 Am. Dec. 433. §§87, 121.
- v. Littler (Tex.) 11 S. W. Repr. 331. §135.
- v. Potter, 18 Barb. 193. §§148, 151.
- Doe v. Naylor, 2 Blackf. 32. §23.
- v. Prettyman, 1 Houst. 339. §56.
- Doe ex dem. Truluck v. Roe, 1 Ga. 3. §70.
- Doherty v. Stimmel, 40 O. St. 294. §154.
- Dolde v. Vodicka, 49 Mo. 100. §49.
- Dolin v. Gardner, 15 Ala. 758. §§21, 129, 162.
- Dominguez v. Lee, 17 La. 296. §114.
- Donahue v. Mills, 41 Ark. 421. §§88, 111, 112, 216.
- Donaldson v. Bank, 1 Dev. Eq. 103. §207.
- v. Farwell, 93 U. S. 631. §250.
- v. Johnson, 2 Chand. 160. §§41, 218.
- v. Phelps, 18 Penn. St. 170. §11.
- Dooley v. Wolcott, 4 Allen (86 Mass.), 406. §229.
- Doolittle v. Cook, 75 Ill. 354. §§158, 159, 163.
- Dore v. Sellers, 27 Cal. 588. §45.
- Dorland v. Magilton, 47 Cal. 485. §231.
- Dorn v. Best, 15 Tex. 62. §§79, 125.
- Dorsey v. Thompson, 37 Md. 25. §191.
- Doswell v. Buchanan, 3 Leigh, 365; s. c. 23 Am. Dec. 280. §§19, 22, 36, 152, 160, 203, 205.
- Doty v. Gorham, 5 Pick. 487; s. c. 16 Am. Dec. 417. §64.
- Douglass v. McCracken, 52 Ga. 596. §§155, 267.
- v. Peele, Clarke (N. Y.), 563. §31.
- Dow v. Gould, 31 Cal. 646. §117.
- v. Jewell, 18 N. H. 340. §100.
- Dowell v. Mitchell, 82 Ky. 47. §105.
- v. Stewart, 83 Ill. 538. §41.
- Downing v. Blair, 75 Ala. 216. §§89, 208.
- Dows v. Kidder, 84 N. Y. 121, 127. §§247, 248, 250.
- Doyle v. Wade, 1 South. Repr. 576. §§42, 198, 199.
- v. Peerless Co., 44 Barb. 239. §§22, 161.
- v. Stevens, 4 Mich. 87. §§234, 269.
- Drake v. Crowell, 40 N. J. L. 58. §43.
- v. Glover, 30 Ala. 382. §§99, 102.
- Draper v. Bryson, 26 Mo. 108; s. c. 69 Am. Dec. 483. §§83, 197, 212.
- Draude v. Rohrer, 9 Mo. App. 249. §186.
- Dresser v. Mo. Ry. Co., 93 U. S. 92. §§205, 206.
- v. Wood, 15 Kan. 344. §43.
- Drew v. Arnold, 85 Mo. 126. §106.
- v. Norbury, 3 Jo. & Lat. 267. §2.
- v. Smith, 59 Me. 393. §251.
- v. Streeter, 137 Mass. 460. §§7, 254.
- Drury v. Foster, 2 Wall. 24; s. c. 1 Dillon, 460. §§87, 99, 101, 116.
- Dubois v. Barker, 4 Hun, 80. §224.
- Dudley v. Abner, 52 Ala. 572. §248.
- Duff v. Duff, 71 Cal. 513. §220.
- v. Wynkoop, 74 Pa. St. 300. §69.
- Dugan v. Follett, 100 Ill. 581. §235.
- Dugger v. Collins, 69 Ala. 324. §83.
- v. Dugger, 84 Va. 130. §223.
- v. McKesson, 100 N. C. 1. §61.
- Duke v. Balme, 16 Minn. 306. §§20, 289.
- v. Clark, 58 Miss. 465. §212.
- v. Strickland, 43 Ind. 494. §274.

- Dukes v. Jones, 6 Jones (N. C.), L. 14. §255.
- Dulaney v. Tilghman, 6 Gill. & J. 461. §102.
- Duly v. Brooks, 30 Mo. 515. §65.
- Duncan v. Louisville, 13 Bush, 378. §204.
- v. Stone, 45 Vt. 123. §251.
- Dundas v. Hitchcock, 12 How. 256. §§108, 115.
- Dundy v. Chambers, 23 Ill. 369. §62.
- Dungan v. Am. Life Ins. Co., 52 Pa. St. 253. §31.
- Dunham v. Dey, 15 Johns. 555; s. c. 8 Am. Dec. 282. §§2, 138, 149, 216, 220.
- Dunklee v. Crane, 103 Mass. 470. §45.
- Dunlap v. Daugherty, 20 Ill. 297. §§66, 70.
- Dunn v. Adams, 1 Ala. 527. §73.
- v. Elser, 2 Tex. Civ. App. §720. §§247, 248.
- v. Gaines, 1 McLean, 321. §57.
- Duphney v. Frenage, 5 Stew. & Port. 215. §§61, 206.
- Durand's Appeal, 116 Pa. St. 93. §144.
- Durant v. Crowell, 97 N. C. 367. §§216, 217.
- Durfee v. Garvey, 63 Cal. 406. §119.
- v. Grinnell, 69 Ill. 371. §246.
- Dusenburg v. Hurlburt, 59 N. Y. 541. §§160, 170.
- Dussaume v. Burnett, 5 Iowa, 95. §§8, 67.
- Dutton v. Stewart, 41 Ark. 101. §§115, 120.
- Duval v. Covenhoven, 4 Wend. 561. §71.
- v. Wilson, 9 Barb. 487. §204.
- Dwight v. Scranton (Mich.), 36 N. W. Repr. 752. §254.
- Dyer v. Witler, 89 Mo. 81. §235.
- Dyke v. Dyer, 14 La. Ann. 701. §52.
- Dyson v. Simmons, 48 Md. 207. §171.
- E.**
- Eadie v. Slimmon, 26 N. Y. 9. §108.
- Earle v. Earle, 1 Spen. 347. §116.
- v. Fisk, 103 Mass. 491. §§4, 18, 152.
- East v. Pugh, 71 Iowa, 162. §§97, 154.
- Eaton v. Freeman, 63 Ga. 538. §§124, 129.
- v. Tuson, 145 Mass. 218. §249.
- Echols v. Cheney, 28 Cal. 157. §59.
- Eck v. Hatcher, 58 Mo. 235. §179.
- Ede v. Johnson, 15 Cal. 53. §§261, 271.
- Edgerly v. Bush, 81 N. Y. 199. §266.
- Edgerton v. Jones, 10 Minn. 427. §§105, 108.
- Edmondson v. Harris, 2 Tenn. Ch. 427. §109.
- Edrington v. Mayfield, 5 Tex. 363. §185.
- Edwards v. Barwise, 69 Tex. 84. §§6, 150, 153, 187, 220, 272.
- v. Derrickson, 4 Dutch. 39. §47.
- v. Drinker, 9 Dana, 69. §§8, 199, 218.
- v. Flaunagan, 104 U. S. 562. §§11, 74.
- v. James, 7 Tex. 375. §96.
- v. McKernan, 55 Mich. 520; s. c. 22 N.W. Repr. 20. §§20, 36, 39, 201.
- v. Thompson, 71 N. C. 177. §§217, 221, 228, 236.
- v. Thorn, 5 South. Repr. 707. §52.
- v. Trumbull, 50 Pa. St. 509. §§32, 138, 174.
- Efinger v. Hall, 81 Va. 94. §216.
- v. Lewis, 32 Pa. St. 367. §§12, 219, 234.
- Eggeman v. Eggeman, 37 Mich. 436. §169.
- Eggleston v. Bradford, 10 Ohio, 312, 315. §11.
- v. Watson, 53 Miss. 339. §147.
- Ehle v. Brown, 31 Wis. 405. §§198, 236.
- Eichelberger v. Sifford, 27 Md. 320. §56.
- Eidson v. Huff, 29 Gratt. 338. §§196, 197.
- Einstein's Sons v. Shouse, 24 Fla. —; s. c. 5 South. Repr. 380. §§246, 254, 255.
- Ellicott v. Pearl, 10 Pet. 442. §§233, 234.
- Ellinbor v. Brakken, 36 Minn. 156. §254.

- Ellinger v. Crowl, 17 Md. 361. §204.
 Elliott v. Peirsoll, 1 McLean, 11. §§23, 88, 92, 93, 101, 120.
 — v. Wood, 45 N. Y. 71; s. c. 53 Barb. 285. §210.
 Ellis v. Martin, 60 Ala. 394. §273.
 — v. Smith, 10 Ga. 253. §§158, 184.
 Ellison v. Wilson, 36 Vt. 67. §§153, 219.
 Ellsworth v. Cent. Ry. Co., 34 N. J. L. 93. §144.
 Elsey v. Lutzens, 8 Hare, 159. §14.
 Elson v. Barrier, 56 Miss. 394. §265.
 Elstor v. Castor, 101 Ind. 246. 443; s. c. 51 Am. Rep. 754. §175.
 Elwell v. Shaw, 16 Mass. 42. §59.
 Ely v. Carnley, 3 E. D. Smith, 489. s. c. 19 N. Y. 496. §260.
 — v. Schofield, 35 Barb. 330. §§33, 34, 204.
 — v. Wilcox, 20 Wis. 523; s. c. 91 Am. Dec. 436. §§8, 14, 20, 22, 75, 142, 157, 158, 216, 233.
 Emmons v. Murray, 16 N. H. 398. §§232, 234, 236, 237.
 Emory v. Seavy, 148 Mass. 566. §374.
 Empire Drill Co. v. Allison, 94 N. C. 548. §§250, 251.
 England v. Hatch, 80 Ala. 247. §95.
 English v. Waples, 13 Iowa, 57. §168.
 Enlow v. Klein, 79 Pa. St. 488. §247.
 Ennor v. Thompson, 46 Ill. 214. §§71, 87.
 Enos v. Cook, 65 Cal. 175. §33.
 Ensworth v. King, 50 Mo. 447. §144.
 Enterprise Transit Co. v. Sheedy, 103 Pa. St. 492. §§92, 119.
 Epley v. Withrow, 7 Watts, 163. §§220, 226.
 Epperson v. Jones, 65 Tex. 425. §182.
 Eppricht v. Nickerson, 78 Mo. 483. §60.
 Eq. Life Ins. Co. v. Slye, 45 Iowa, 615. §45.
 Erickson v. Rafferty, 79 Ill. 209. §147.
 Erskine v. Davis, 25 Ill. 251. §57.
 Erwin v. Shuey, 8 O. St. 509. §§211, 217.
 Eslinger v. Eslinger, 47 Cal. 62. §114.
 Espin v. Pemberton, 3 DeG. & J. 547. §§221, 242.
 Estabrook v. Messersmith, 18 Wis. 551. §211.
 Estate of Prudhomme, 35 La. Ann. 984. §150.
 Etheridge v. Ferebee, 9 Ired. 312. §110.
 — v. Hilliard, 100 N. C. 250. §274.
 Etzler v. Evans, 61 Ind. 56. §175.
 Evans v. Ashley, 8 Mo. 177. §48.
 — v. Etheridge, 99 N. C. 43. §66.
 — v. Greenhow, 15 Gratt. 153. §207.
 — v. Lee, 11 Nev. 194. §66.
 — v. McGlasson, 18 Iowa, 150. §10.
 — v. Richardson, 76 Ala. 329. §54.
 — v. Summerlin, 19 Fla. 858. §§115, 186.
 — v. Templeton, 69 Tex. 375; s. c. 5 Am. St. Rep. 71. §204.
 — v. Wells, 22 Wend. 325. §39.
 Everett v. Brown, 64 Iowa, 420. §253.
 — v. Stone, 3 Story, 446. §192.
 Everman v. Robb, 52 Miss. 653. §28.
 Everston v. Sawyer, 2 Wend. 507. §48.
 Everts v. Agnes, 4 Wis. 343; s. c. 65 Am. Dec. 314. §§204, 206.
 Evitts v. Roth, 61 Tex. 81. §234.
 Ewing v. Burnett, 11 Pet. 53. §§233, 234.
 Excelsior Co. v. Keyser, 62 Miss. 155. §§174, 190.
 Exchange Bk. v. Knox, 19 Gratt. 739. §207.
 Ex parte Ames, 1 Low. 561, 567. §252.
 — Fitz, 2 Lowell, 519. §40.
 Eylar v. Eylar, 60 Tex. 319. §§228, 230, 231.
 Eyster v. Hathaway, 50 Ill. 521; s. c. 99 Am. Dec. 537. §94.
 Ezzard v. Frick, 76 Ga. 512. §248.

F.

- Fair v. Stevenot, 29 Cal. 486. §232.
 Fairbanks v. Phelps, 22 Pick. 535. §249.
 Faircloth v. Jordan, 18 Ga. 350. §160.

- Fairfield Bk. v. Chase, 72 Me. 226. §244.
 Fairfield Bridge Co. v. Nye, 60 Me. 372. §253.
 Fairthorn v. Davis, 28 La. Ann. 728. §52.
 Fales v. Roberts, 38 Vt. 503. §251.
 Fall v. Roper, 3 Head. 485. §§91, 92, 123.
 Fallass v. Pierce, 30 Wis. 412. §§13, 92, 97, 142, 155, 156, 162, 200, 210.
 Fallon v. Kehoe, 38 Cal. 44; s. c. 99 Am. Dec. 347. §§57, 78.
 Fargason v. Edrington, 49 Ark. 207. 216. §§10, 12, 35, 155, 170, 183, 202, 209, 210, 216.
 Farley v. Carpenter, 27 Hun, 359. §176.
 — v. Lincoln, 51 N. H. 579; s. c. 12 Am. Rep. 182. §247.
 Farmer's Bank v. Bronson, 14 Mich. 361. §§40, 150, 188.
 — v. Butterfield, 100 Ind. 229. §175.
 — v. Chester, 6 Humph. 458. §64.
 — v. Drury, 38 Vt. 426. §144.
 — v. Fletcher, 44 Iowa, 252. §44.
 — v. Payne, 25 Conn. 444. §244.
 — v. Sperling, 113 Ill. 273. §228.
 — v. Wallace, 45 O. St. 152. §§154, 208, 235.
 Farmer's Loan Co. v. Hendrickson, 25 Barb. 484. §§41, 252, 270.
 — v. Maliby, 8 Paige, 361. §§22, 160, 206, 234.
 Farnum v. Buffum, 4 Cush. 260. §73.
 Farrar v. Payne, 73 Ill. 82. §§35, 177, 210.
 Farwell v. Houghton Works, 8 Fed. Repr. 66. §244.
 Fash v. Ravesies, 32 Ala. 451. §§10, 199, 205.
 Fasset v. Smith, 23 N. Y. 252. §235.
 Faught v. Holway, 50 Me. 24. §234.
 Faulke v. Bond, 41 N. J. L. 527. §235.
 Fawcett v. Osborn, 32 Ill. 411; s. c. 83 Am. Dec. 278. §§154, 245.
 Fawell v. Heelis, Amb. 724. §20.
 Fay v. Valentine, 12 Pick. 40; s. c. 22 Am. Dec. 397. §§172, 226.
 Feirbough v. Masterson, 1 Idaho, 135. §§228, 233.
 Fell v. Young, 63 Ill. 106. §95.
 Felton v. Pitman, 14 Ga. 536. §159.
 Fenno v. Sayre, 3 Ala. 458. §159.
 Fergus v. Woodworth, 44 Ill. 374. §191.
 Ferguson v. Ashbell, 53 Tex. 249. §45.
 — v. Clifford, 37 N. H. 86. §§266, 268, 272.
 — v. Glassford (Mich.), 35 N. W. Repr. 820. §175.
 Ferris v. Boxell, 34 Minn. 392. §56.
 — v. Smith, 24 Vt. 27. §16.
 Ferry v. Pfeiffer, 18 Wis. 510. §28.
 Feurt v. Rowell, 62 Mo. 524. §§254, 265.
 Field v. Gellerson, 80 Mo. 270. §251.
 — v. Moore, 19 Beav. 176. §116.
 Filley v. Duncan, 1 Neb. 134. §20.
 Final v. Backus, 18 Mich. 218. §§71, 72.
 Finch v. Shaw, 19 Beav. 500. §241.
 — v. Winchelsea, 1 P. Wms. 277. §§10, 25, 192.
 Fipp v. McGehee, 5 Port. 413. §128.
 Firby v. Miller, 1 Casey, 264. §155.
 Firebaugh v. Ward, 51 Tex. 409. §169.
 First Nat. Bk. v. Christopher, 40 N. J. 435. §240.
 — v. Comfort, 4 Dak. —; s. c. 28 N. W. Repr. 855. §274.
 — v. Damm, 63 Wis. 249. §§246, 254, 255, 261.
 — v. Hayzlett, 40 Iowa, 659. §§192, 212.
 — v. Loyhed, 28 Minn. 396. §244.
 — v. Paul, 75 Va. 594; s. c. 40 Am. Rep. 740. §§87, 92.
 Fish v. Benson, 71 Cal. 428. §36.
 — v. N. Y. Paper Co., 29 N. J. Eq. 610. §257.
 Fisher v. Butcher, 19 Ohio, 406; s. c. 53 Am. Dec. 436. §56.
 — v. Johnson, 5 Ind. 492. §20.
 — v. Knox, 11 P. St. 622. §14.
 — v. Meister, 24 Mich. 447. §69.
 — v. Tunnard, 25 La. Ann. 179. §§31, 138, 252.
 Fisk v. Miller, 13 Tex. 226. §101.
 — v. Potter, 2 Abb. App. Dec. 138. §20.

- Fitch v. Boyer, 51 Tex. 336. §187.
 — v. Humphrey, 1 Den. 163. §260.
 Fitzgerald v. Fitzgerald, 100 Ill. 385. §90.
 — v. Goff, 99 Ind. 28. §144.
 Flagg v. Mann, 2 Sumn. 510. §§12, 27, 224, 227, 228, 239.
 Flanagan v. Boggess, 43 Tex. 335. §21.
 — v. Brown, 70 Cal. 254. §29.
 — v. Young, 2 Har. & McH., 38. §69.
 Flaster v. Fleming, 56 Ill. 457. §191.
 Fleetwood v. Brown, 109 Ind. 571. §27.
 Fleming v. Bergin, 2 Ired. Eq. 584. §§30, 189, 217.
 — v. Ervin, 6 W. Va. 215. §8.
 — v. Potter, 14 Ind. 486. §103.
 — v. Reed, 37 Tex. 152. §128.
 Fleschner v. Sumpter, 12 Or. 161. §§75, 133.
 Fleicher v. Beck, 6 Cranch, 36. §155.
 — v. Ellison, 1 Tex. Un. Cas. 661. §§54, 183, 205, 206, 213.
 — v. Holmes, 32 Ind. 297. §172.
 — v. Horne, 75 Ga. 134. §144.
 — v. Morey, 2 Story, 555. §213.
 Flint v. Auditor-Gen., 41 Mich. 635. §210.
 — v. Clinton Co., 12 N. H. 430. §60.
 Florence v. Hopkins, 46 N. Y. 182. §235.
 Flory v. Comstock, 61 Mich. 522. §257.
 Flowers v. Wilkes, 1 Swan, 408. §16.
 Floyd v. Harding, 28 Gratt. 401. §§10, 187, 192.
 Flynt v. Arnold, 2 Metc. 619. §§162, 181, 214.
 Fogarty v. Finlay, 10 Cal. 239; s. c. 70 Am. Dec. 714. §§17, 18, 87, 121.
 — v. Sawyer, 23 Cal. 570. §73.
 Fogg v. Holcomb, 64 Iowa, 621. §§71, 97.
 Folger v. Weber, 16 Hun, 512. §276.
 Folsom v. Fowler, 15 Ark. 280. §250.
 Fountaine v. Beers, 19 Ala. 722. §276.
 — v. Boatmen's Bank, 57 Mo. 553. §144.
 Foorman v. Wallace, 75 Cal. 552. §§52, 212.
 Forbes v. Parker, 16 Pick. (33 Mass.), 462. §254.
 Ford v. Cobb, 20 N. Y. 344. §252.
 — v. Gregory, 10 B. Mon. 177. §115.
 — v. Osborne, 45 O. St. 1. §90. 121.
 — v. Teal, 7 Bush, 158. §87.
 — v. Wilson, 35 Miss. 504. §234.
 — v. White, 16 Beav. 120. §§152, 165, 216.
 Fords v. Vance, 17 Iowa, 92. §212.
 Fordyce v. Neal, 40 Mich. 705. §253.
 Forrest v. Jackson, 56 N. H. 357. §§222, 228.
 Fort v. Burch, 6 Barb. 60. §3.
 Fortune v. Watkins, 94 N. C. 304. §§189, 217.
 Fosdick v. Schall, 99 U. S. 235. §250.
 Foster v. Beardsley Scythe Co., 47 Barb. 505. §190.
 — v. Chapman, 4 McCord, 291. §42.
 — v. Dennison, 9 Ohio, 121. §11.
 — v. Dugan, 8 Ohio, 87; s. c. 31 Am. Dec. 432. §§150, 163.
 — v. Essex Bank, 16 Mass. 245. §97.
 — v. Paine, 63 Iowa, 85. §175.
 — v. Perkins, 42 Me. 168. §§254, 275, 276.
 — v. Stallworth, 62 Ala. 547. §223.
 Foster's Appeal, 3 Pa. St. 79. §172.
 Fouche v. Swan, 80 Ala. 153. §16.
 Foulke v. Bond, 12 Vroom, 527. §237.
 Foushee v. Grigsby, 12 Bush, 75. §§45, 46.
 Fowler v. Evans, 26 Tex. 636. §135.
 — v. Merrill, 11 How. 375. §§190, 296.
 — v. Shearer, 7 Mass. 19. §59.
 — v. Stoneum, 11 Tex. 478, 511. §250.
 Fowke v. Woodward, Speer's Eq. 233. §186.
 Fowlke v. Zimmerman, 14 Wall. (81 U. S.), 113. §51.
 Fox v. Hall, 74 Mo. 315; s. c. 41 Am. Rep. 316. §27.
 — v. Hinton, 4 Bibb. 559. §234.

- Fox v. Thibault, 33 La. Ann. 32. §§18, 148.
 Fraim v. Frederick, 32 Tex. 294. 308. §§205, 206.
 Francis v. Wells, 2 Colo. 660. §20.
 Frank v. Miner, 50 Ill. 444. §§55, 65, 148.
 Frankfort Bank v. Anderson, 3 A. K. Marsh. 932. §60.
 Frankland v. Moulton, 5 Wis. 1. §252.
 Franklin v. Kesler, 28 Tex. 138. §25.
 Fraser v. Gilbert, 11 Hun, 634. §§196, 254.
 Frasier v. Gelston, 35 Md. 298. §99.
 Frazee v. Inslee, 2 N. J. Eq. 239. §175.
 Fredenwold v. Mullen, 10 Heisk. 226. §186.
 Freeman v. Deming, 3 Sandf. Ch. 327. §205.
 — v. McKean, 25 Barb. 474. §250.
 — v. Schroeder, 43 Barb. 618. §170.
 Freiberg v. Magale, 70 Tex. 116. §§16, 198.
 Frey v. Clifford, 44 Cal. 335. §183.
 French Bank v. Beard, 54 Cal. 480. §106.
 French v. De Bow, 38 Mich. 708. §175.
 — v. French, 3 N. H. 234. §145.
 — v. Loyal Co., 5 Leigh, 627. §225.
 — v. Strumberg, 52 Tex. 109. §114.
 Frankle v. Hudson, 82 Ala. 158. §243.
 Fresno Canal Co. v. Rowell, 80 Cal. 114. §294.
 Frick's Appeal, 101 Pa. St. 485. §§163, 164.
 Friedlay v. Hamilton, 17 Serg. & R. 70. §31.
 Frink v. Dowdall, 14 Ill. 304. §161.
 Frisby v. Withers, 61 Tex. 134. §234.
 Fromme v. Jones, 13 Iowa, 474. §216.
 Frost v. Beekman, 1 Johns. Ch. 288. §§31, 205, 206.
 Frostburg v. Brace, 51 Md. 508. §§60, 145.
 — v. Hamill, 55 Md. 313. §§216, 217.
 Fry v. Clifford, 44 Cal. 335. §207.
 Fry v. Martin, 33 Ark. 203. §§12, 165, 189, 196, 212.
 — v. Porter, 1 Mod. 300. §225.
 — v. Schnee, 55 Ga. 210. §171.
 Frye v. Bank of Ill., 11 Ill. 367. §164.
 — v. Partridge, 82 Ill. 267. §216.
 Fryer v. Rishell, 84 Pa. St. 521. §216.
 — v. Rockefeller, 63 N. Y. 268. §§76, 77.
 Fuller v. Bennett, 2 Hare, 394. §§221, 241.
 — v. Cunningham, 105 Mass. 442. §§140, 150, 272.
 — v. Paige, 26 Ill. 358; s. c. 79 Am. Dec. 375. §269.
 — v. O'Neal, 69 Tex. 349; s. c. 5 Am. St. Rep. 59. §24.
 — v. Scribner, 76 N. Y. 190. §43.
 Fullerton v. Doyle, 18 Tex. 4. §118.
 Fulton v. Bayne, 18 Tex. 50. §96.
 — Bk. v. N. Y. Canal Co., 4 Paige, 127. §§238, 243, 244.
 Fund Commissioners v. Glass, 17 Ohio, 542. §73.
 Funk v. Paul, 64 Wis. 35; s. c. 54 Am. Rep. 576. §§207, 245, 269.
 — v. Staats, 24 Ill. 632. §246.
 Funkhouser v. Lay, 78 Mo. 458. §155.
 Fuhman v. Loudon, 13 Serg. & R. 386; s. c. 15 Am. Dec. 608. §70.

G.

- Gabbert v. Schwartz 9 In 40. §204.
 Gabbey v. Forgeous, 5 K 62. §121.
 Gaffney v. Peeler, 21 S. Car. 55. §9.
 Gage v. Dubuque, 11 Iowa, 310. §73.
 — v. Wheeler (Ill.), 21 N. E. Repr. 1075. §§76, 246.
 Gagneux's Succession, 40 La. Ann. 707. §358.
 Gainer v. Cotton, 49 Tex. 101. §96.
 Gaines v. Catron, 1 Humph. 514. §97.
 — v. De LaCroix, 6 Wall. (73 U. S.), 719. §51.
 — v. Saunders, 50 Ark. 322. §179.

- Gaines v. New Orleans, 6 Wall. 642. §216.
- Gaither v. Mumford. Taylor's Term (N. C.), 167. §255.
- Gale v. Blaikie, 129 Mass. 206. §46.
- v. Morris, 29 N. J. Eq. 222. §§39, 153, 204.
- v. Shillock (Dak.), 29 N. W. Repr. 661. §234.
- v. Ward, 14 Mass. 352. §252.
- Gallard v. Jackman, 26 Cal. 79. §223.
- Galpin v. Abbott, 6 Mich. 17. §§28, 145.
- Galt v. Dibrell, 10 Yerg. 147. §97.
- Galway v. Malthow, 7 Neb. 285. §§10, 42, 166, 169, 192, 196.
- Gannion v. Hodges, 73 Ill. 140. §187.
- Gansen v. Tomlinson, 23 N. J. Eq. 405. §31.
- Gardiner v. Parmalee, 31 Ohio, 551. §271.
- Gardner v. Case, 111 Ind. 494. §§109, 121.
- v. Earley, 72 Iowa, 518. §§13, 154, 166, 169, 232, 235, 239.
- v. Eberheart, 82 Ill. 316. §48.
- v. Emerson, 40 Ill. 296. §171.
- v. Moore, 51 Ga. 268. §§126, 145.
- Garland v. Harrison, 17 Mo. 282. §175.
- Garnet v. Stockton, 7 Humph. (Tenn.), 84. §76.
- Garner v. Thompson, 1 Tex. Law Rev. 286. §114.
- Garrett v. Moss, 22 Ill. 363. §§103, 109.
- v. Puckett, 15 Ind. 485. §181.
- Garrison v. Crowell, 67 Tex. 626. §154.
- v. Hayden, 1 J. J. Marsh. 222; s. c. 19 Am. Dec. 70. §§134, 187.
- Garth v. Fort, 15 Lea, 683. §§90, 91.
- Garwood v. Eldredge, 2 N. J. Eq. 145; s. c. 34 Am. Dec. 195. §216.
- Garwood v. Garwood, 4 Halst. 193. §198.
- Gass v. Hampton, 16 Nev. 189. §§41, 247.
- Gassen v. Hendrick, 74 Cal. 444. §207.
- Gassner v. Patterson, 23 Cal. 299. §§41, 218.
- Gaston v. Merriam, 33 Minn. 275. §187.
- Gates v. Hester, 81 Ala. 357. §§112, 113.
- Gatewood v. Hart, 58 Mo. 261. §§23, 61.
- Geary v. City of Kansas, 61 Mo. 378. §150.
- Geib v. Reynolds, 35 Minn. 331. §175.
- Gen. Ins. Co. v. U. S. Ins. Co. 10, Md. 517; s. c. 69 Am. Dec. 174. §§12, 39, 216, 244.
- Genesee Nat. Bank v. Whitney, 103 U. S. 99. §171.
- George v. Kent, 7 Allen, 16. §§178, 181.
- v. Wood, 9 Allen, 80. §§163, 164.
- Gerdin v. Menage (Minn.), 43 N. W. Repr. 91. §381.
- Gere v. Cushing, 5 Bush, 304. §45.
- Gerow v. Castello, 11 Colo. 560. §250. 269.
- Getchell v. Moran, 124 Mass. 404. §46.
- Gherson v. Pool, 31 Ark. 85. §§204, 210.
- Gibbes v. Cobb, 7 Rich. Eq. 54. §186.
- Gibbons v. Gentry, 20 Mo. 468. §62.
- Gibbs v. Jones, 46 Ill. 319. §250.
- Gibert v. Peteler, 38 N. Y. 165; s. c. 97 Am. Dec. 785. §§147, 178, 181.
- Gibler v. Trimble, 14 Ohio, 323. §205.
- Gibson v. Chouteau, 39 Mo. 536. §161.
- v. Eller, 13 Ind. 124. §231.
- v. Keyes, 112 Ind. 568. §168.
- v. Hibbard, 13 Mich. 217. §120.
- v. Hough, 60 Ga. 588. §137.
- v. Sevmour, 4 Vt. 518. §137.
- v. Warden, 14 Wall. 244. §255.
- v. Winslow, 46 Pa. St. 380; s. c. 84 Am. Dec. 552. §182.
- Giddens v. Byers, 12 Tex. 75. §59.
- Giffin v. Barr, 60 Vt. 599. §§18, 150.
- Gifford v. Rockett, 121 Mass. 431. §57.
- Gilbert v. Jess, 31 Wis. 110. §§12, 159, 238.
- v. Vail, 60 Vt. 261. §271.

- Gilbraith v. Gallivan, 78 Mo. 452. §§64, 91.
- Gilchrist v. Gough, 63 Ind. 576; s. c. 30 Am. Rep. 250. §§17, 142, 170, 178, 181, 207, 208, 209, 210.
- Gildersleeve v. Landon, 73 N. Y. 709. §269.
- Gill v. Fauntleroy, 8 B. Mon. 177. §§68, 69.
- v. Hardin, 48 Ark. 409. §233.
- v. Pinney, 12 O. St. 38. §131.
- Gillett v. Gaffney, 3 Col. 351. §§2, 162.
- Gillespie v. Brown, 16 Neb. 457. §150.
- v. Cammack, 3 La. Ann. 248. §136.
- v. Jones, 26 Tex. 343. §234.
- v. Remington, 66 Tex. 109. §47.
- v. Rogers, 146 Mass. 610. §§16, 57.
- Gillig v. Maas, 28 N. Y. 191. §142.
- Gilliland v. Kendall (Neb., 1889), 28 Cent. Law J. 543. §274.
- Gilman, etc., Ry. v. Kelley, 77 Ill. 426. §242.
- Gilpin v. Page, 18 Wall. 350. §224.
- Gilson v. Boston, 11 Nev. 413. §216.
- Givanovitch v. Hebrew Congregation, 36 La. Ann. 272. §§131, 172.
- Girardin v. Lamp, 58 Wis. 267. §33.
- Gitt v. Watson, 18 Mo. 274. §§57, 78.
- Gittings v. Hall, 2 H. & Johns. 112. §§65, 234.
- Given v. Doe, 7 Blackf. 210. §1.
- Glading v. Frick, 88 Pa. St. 460. §16.
- Glaze v. Blake, 56 Ala. 379. §247.
- Glendenning v. Bell, 70 Tex. 632. §§159, 198, 221, 228, 236.
- Glidden v. Hunt, 24 Pick. 221. §§154, 157, 204.
- Goddard v. Prentice, 17 Conn. 546. §198.
- v. Sawyer, 9 Allen, 78. §11.
- Godfrey v. Thornton, 46 Wis. 677. §99.
- Goelet v. McManus, 1 Hun. 306. §156.
- Goff v. Pope, 83 N. C. 127. §253.
- v. Roberts, 72 Mo. 570. §100.
- Golden v. Cockrill, 1 Kan. 259; s. c. 81 Am. Dec. 510. §§253, 254, 262.
- Goldsborough v. Turner, 67 N. C. 403. §§19, 203.
- Gooue v. Smith, 13 Cal. 81. §108.
- Goodel v. Burnett, 22 Wis. 265. §161.
- Goodenough v. Warren, 5 Saw. 494. §§55, 101.
- Goodenow v. Dunn, 21 Me. 86. §275.
- Gooding v. Riley, 50 N. H. 409. §269.
- Goodman v. Simonds, 20 How. (U. S.). 343, 371. §208.
- Goodrich v. Michael, 3 Colo. 77. §§211, 213, 254.
- Goodsell v. Sullivan, 40 Conn. 83. §132.
- Goodwin v. Col. M. Inv. Co., 110 U. S. 1. §48.
- Goodyear v. Goodyear, 72 Iowa, 329. §169.
- v. Hullihen, 2 Hughes, 492. §71.
- v. Williston, 42 Cal. 11. §273.
- Goodykootz v. Olsen, 54 Iowa, 174. §23.
- Gordon v. Avery, 102 N. C. 532. §433.
- v. Bell, 50 Ala. 213. §20.
- v. Hobart, 2 Sumn. 401, §62.
- v. Knox, 31 La. Ann. 284. §§173, 258.
- v. Leech, 81 Ky. 229. §§62, 82, 111.
- v. Rixley, 76 Va. 694. §§20, 33, 40, 174, 209, 214, 246.
- Gorham v. Sumners, 25 Minn. 81. §§140, 255.
- Gorman v. Stanton, 5 Mo. App. 585. §109.
- Goss v. Furman, 21 Fla. 406. §117.
- Gossard v. Ferguson, 54 Ind. 519. §48.
- Gott v. Powell, 41 Mo. 416. §191.
- Gould v. Woodward, 4 Greene, 82. §77.
- Gower v. Doheney, 33 Iowa, 38. §199.
- Grace v. Wade, 45 Tex. 522. §§10, 42, 192, 196, 202, 212.
- Graff v. Middleton, 43 Cal. 341. §§27, 183.
- Graham v. Anderson, 42 Ill. 514; s. c. 92 Am. Dec. 89. §70.
- v. Evans, 39 Minn. 382. §380.
- v. Hawkins, 38 Tex. 635. §182.

- Graham v. Hawkins, 1 Tex. Un. Cas. 514. §§178, 223.
- v. Long, 65 Pa. St. 386. §105.
- v. Nesmith, 24 S. Car. 285. §§199, 228, 236.
- Grandin v. Anderson, 15 O. St. 286. §178.
- v. Hunt, 80 Ala. 116. §24.
- Grand Island Co. v. Frey, 25 Neb. 66. §§261, 265.
- Grand Tower Co. v. Gill, 111 Ill. 541. §74.
- Granger v. Adams, 90 Ind. 87. §264.
- Grant v. Bissett, 1 Caines' Cas. 112. §4.
- v. Burr, 54 Cal. 298. §210.
- v. Cole, 8 Ala. 519. §240.
- v. Dodge, 43 Me. 489. §172.
- v. Strong, 18 Wall. 623. §4.
- Graves v. Ward, 2 Duv. 301. §29.
- Gray v. Moseley, 2 Mumf. 546. §§197, 218.
- v. Parpart, 106 U. S. 679. §224.
- Greeley v. Smith, 3 Woodb. & M. 236. §276.
- Green v. Abraham, 43 Ark. 420. §§67, 97.
- v. Carrington, 16 O. St. 548; s. c. 91 Am. Dec. 103. §142.
- v. Deal, 4 Hun, 703. §§167, 170.
- v. DeMoss, 10 Humph. 371. §20.
- v. Drinker, 7 Watts & S. 440. §§23, 97.
- v. Early, 39 Md. 223. §181.
- v. Ely, 2 Greene, 508. §45.
- v. Goodall, 1 Cold. 412. §196.
- v. Green, 16 Ind. 253; s. c. 79 Am. Dec. 428. §45.
- v. Harmon, 4 Dev. Law. 158. §233.
- v. Liter, 8 Cranch, 229. §234.
- v. Rick, 121 Pa. St. 130; s. c. 6 Am. St. Rep. 760. §175.
- v. Scranage, 19 Iowa. 461; s. c. 87 Am. Dec. 447. §§89, 121.
- v. VanBuskirk, 7 Wall. 139; s. c. 5 Wall. 307. §§267, 268.
- v. Warnick, 64 N. Y. 220. §§31, 167, 170.
- v. Weissenberg, 57 Pa. St. 433; s. c. 98 Am. Dec. 237. §97.
- Green v. Witherspoon, 37 La. Ann. 751. §147.
- Greeneaux v. Wheeler, 6 Tex. 515. §40.
- Greenleaf v. Edes, 2 Minn. 264. §§42, 192, 199, 212.
- Greene v. Barnard, 18 Kan. 518. §20.
- Greenwood v. Jenswold, 69 Iowa, 533. §§66, 71.
- Greer v. Higgins, 20 Kan. 420. §222.
- Gregg v. Owens, 37 Minn. 61. §186.
- v. Sanford, 24 Ill. 17; s. c. 76 Am. Dec. 725. §273.
- v. Sloan, 76 Va. 497. §§211, 214, 254.
- Gregory v. Ford, 5 B. Mon. 471. §§98, 103, 107.
- v. North Pacific, 15 Or. 447. §253.
- v. Paul, 15 Mass. 31. §118.
- v. Perkins, 4 Dev. 50. §§31, 129.
- v. Thomas, 20 Wend. 17. §§258, 269.
- Grellett v. Heilshorn, 4 Nev. 526. §§31, 137.
- Gress v. Evans, 1 Dak. 387. §223.
- Grice v. Haskins, 77 Ga. 700. §140.
- Gridly v. Hopkins, 84 Ill. 528. §49.
- Griesler v. McKennon, 44 Ark. 517. §52.
- Griffin v. Cunningham, 20 Gratt. 31. §64.
- v. New Jersey Oil Co., 11 N. J. Eq. 49. §164.
- v. Sheffield, 38 Miss. 359; s. c. 77 Am. Dec. 646. §150.
- v. Wertz, 2 Bradw. 487. §254.
- Griffith v. Douglass, 73 Me. 532; s. c. 40 Am. Rep. 359. §§245, 274.
- v. Griffith, 1 Hoff. Ch. 153. §§220, 221.
- Grignon's Lessee v. Astor, 2 How. 319. §50.
- Grimes v. Connell, 23 Neb. 187. §253.
- Grimstone v. Carter, 3 Paige. 421; s. c. 24 Am. Dec. 230. §§19, 36, 138, 205, 228, 231.
- Griswold v. Davis, 31 Vt. 390. §208.
- Groesbeck v. Bodman (Tex.), 11 S. W. Repr. 322. §123.
- v. Seeley, 13 Mich. 329. §67.
- Groff v. Ramsey, 19 Minn. 44. §228.
- Grotenkemper v. Carver, 10 Lea, 280. §§64, 90, 104.

- Groton Sav. Bk. v. Beatty, 30 N. J. Eq. 133. §230.
 Grove v. Todd, 41 Md. 633; s. c. 20 Am. Rep. 76. §§61, 97, 98.
 — v. Zumbro, 14 Gratt. 501. §110.
 Gudger v. Henseley, 82 N. C. 56. §236.
 Guerrant v. Anderson, 4 Rand. 208. §§10, 196, 197.
 Guillander v. Howell, 35 N. Y. 657. §268.
 Guinn v. Turner, 18 Iowa, 1. §142.
 Guion v. Knapp, 6 Paige, 35; s. c. 29 Am. Dec. 741. §164.
 Guiteau v. Wisely, 47 Ill. 433. §§42, 212.
 Gully v. May, 84 N. C. 434. §§31, 139.
- H.**
- Haak v. Lindermann, 64 Pa. St. 499. §§248, 250.
 Hacker v. Horiemus (Wis.), 41 N. W. Repr. 965. §234.
 Hackett v. Baily, 86 Ill. 74. §99.
 — v. Callender, 32 Vt. 97. §§26, 192.
 — v. Manlove, 14 Cal. 85. §254.
 Hackleman v. Goodman, 75 Ind. 202. §274.
 Hackney v. Butts, 41 Ark. 394. §54.
 Hackwith v. Damroff, 1 Mont. 235. §228.
 Hafter v. Strange, 65 Miss. 323. §230.
 Hagenbuck v. Phillips, 112 Pa. St. 284. §84.
 Hager v. Spect, 52 Cal. 579. §§29, 152, 177.
 Hagerman v. Shirley, 88 Mo. 424. §203.
 — v. Sutton, 91 Mo. 519. §§29, 176.
 Haggerty v. Palmer, 6 Johns. Ch. 437. §250.
 Haines v. Crane, 2 Pick. 610. §254.
 Halbert v. McCulloch, 3 Met. 456. §209.
 Hale v. Christy, 8 Neb. 264. §100.
 — v. Omaha Bank, 33 N. J. Sup. Ct. 40. §208.
 Hall v. Delaplain, 5 Wis. 206; s. c. 68 Am. Dec. 57. §202.
 — v. Edwards, 43 Mich. 473. §164.
 — v. Gustin, 54 Mich. 624. §43.
 Hall v. Hall, 47 Ala. 290. §50.
 — v. Hinks, 21 Md. 406. §250.
 — v. Hurd, 40 Kan. 374. §351.
 — v. Livingston, 3 Del. Ch. 348. §225.
 — v. Patterson, 51 Pa. St. 289. §89.
 — v. Pillow, 31 Ark. 32. §266.
 Halloway v. Platner, 20 Iowa, 121; s. c. 89 Am. Dec. 517. §§199, 212.
 Halls v. Thompson, 1 Sm. & M. (9 Miss.), 443. §§79, 80.
 Hall's Lessee v. Ashby, 9 Ohio, 96; s. c. 34 Am. Dec. 424. §51.
 Halstead v. Bk. of Kentucky, 4 J. J. Marsh. 554. §§39, 155, 162, 207.
 Hamilton v. Boggess, 63 Mo. 233. §159.
 — v. Maas, 77 Ala. 283. §273.
 — v. Nutt, 34 Conn. 501. §§178, 181, 221.
 Hamlin v. Cassafer, 15 Or. 456. §64.
 Hammell v. Hammell, 19 Ohio, 17. §144.
 Hammers v. Dole, 61 Ill. 307. §67.
 Hammond v. Paxton, 58 Mich. 393. §43.
 Hanbury v. Litchfield, 2 My. & K. 629. §236.
 Hance v. Antone, 1 Tex. Civ. App., §800. §275.
 Hancock v. Beverly, 6 B. Mon. 531. §184.
 — v. Byrne, 2 Dana. 40. §29.
 — v. Tram Lumber Co., 65 Tex. 225. §§56, 134.
 Hand v. Hand, 68 Cal. 135. §118.
 — v. McKinney, 25 Ga. 648. §§7, 132.
 Handley v. Howe, 22 Me. 560. §256.
 Hanes v. Tiffany, 25 O. St. 549. §§211, 271.
 Hankinson v. Barber, 29 Ill. 80. §229.
 Hanlan v. Doherty, 109 Ind. 37. §175.
 Hanrick v. Barton, 16 Wall. 166, 173. §59.
 — v. Patrick, 119 U. S. 156. §130.
 — v. Thompson, 9 Ala. 409. §234.
 Harang v. Plattsmier, 21 La. Ann. 426. §§12, 165, 189, 196, 217.

- Harbinson v. Harrell, 19 Ala. 753. \$129.
 Hardaway v. Semmes, 24 Ga. 305. §§41, 255.
 — v. —, 38 Ala. 657. §§196, 268.
 Harden v. Crate, 78 Ill. 573. \$144.
 Hardenburg v. Larkin, 47 N. Y. 113. \$117.
 Hardin v. Harrington, 11 Bush, 367. §§154, 202.
 — v. Kirk, 49 Ill. 153; s. c. 95 Am. Dec. 519. \$70.
 — v. Osborne, 60 Ill. 93. §§70, 71, 75.
 — v. Sparks, 70 Tex. 429. \$205.
 Harding v. Coburn, 12 Met. (53 Mass.), 333. \$253.
 — v. Curtis, 45 Ill. 252. §§61, 66.
 Hardy v. Norfolk, 80 Va. 404. \$144.
 Harkins v. Forsythe, 11 Leigh, 204. §§89, 90, 101, 121.
 Harkness v. Russell, 118 U. S. 663. §§247, 249, 250.
 Harkreader v. Clayton, 56 Miss. 383; s. c. 31 Am. Rep. 369. \$154.
 Harlan v. Seaton, 18 B. Mon. 312. \$184.
 Harland v. Howard, 79 Ky. 373. \$95.
 Harman v. Oberdorfer, 33 Gratt. 497. \$144.
 Harmon v. Magee, 57 Miss. 410. §§91, 93.
 Harpending v. Wiley, 14 Bush. 380. \$87.
 Harper v. Barsh, 10 Rich. Eq. 149. \$145.
 — v. Bibbs, 34 Miss. 472; s. c. 69 Am. Dec. 397. \$202.
 — v. Tapley, 35 Miss. 506. \$134.
 Harral v. Laverty, 50 Conn. 46. §§12, 221, 222, 229.
 Harrell v. Goodwin, 102 N. C. 330. \$433.
 — v. Gray, 10 Neb. 186. §§166, 169, 192.
 Harrington v. Allen, 48 Miss. 493. §§4, 12, 216.
 — v. Brittan, 23 Wis. 541. §§253, 254.
 — v. Erie Co. Bank, 101 N. Y. 257. \$154.
 — v. Fish, 10 Mich. 415. §§74, 75, 79.
 — v. Fortner, 58 Mo. 468. \$146.
 Harris v. Arnold, 1 R. I. 125. §§12, 224, 229.
 — v. Burton, 4 Harr. 66. \$65.
 — v. Cook, 28 N. J. Eq. 345. \$175.
 — v. Hanks, 25 Ark. 510. \$20.
 — v. Horner, 1 Bay. & Bat. 445; s. c. 30 Am. Dec. 142. §§207, 211.
 — v. Jones, 83 N. C. 317. \$261.
 — v. Kennedy, 48 Wis. 500. \$253.
 — v. McIntyre, 118 Ill. 275. \$221.
 — v. Norton, 16 Barb. 264. \$205.
 — v. Price, 14 B. Mon. 333. §§61, 69.
 — v. Seinsheimer, 67 Tex. 356. \$200.
 — v. Walworth, 129 U. S. 355. §§267, 268.
 — v. Woodard, 96 N. C. 232. \$253.
 Harrison v. Boring, 44 Tex. 256. §§27, 49, 183, 223.
 — v. Burlingame, 43 Hun, 212. \$252.
 — v. Cochelin, 23 Mo. 117. \$19.
 — v. McMurry, 71 Tex. 122. §§151, 187.
 — v. McWhirter, 12 Neb. 152. §§54, 189.
 — v. Oakman, 56 Mich. 390. \$105.
 — v. Phillips, 12 Mass. 456. §§31, 137.
 — v. Simmons, 55 Ala. 510. * \$73.
 — v. Strother, 1 Bay, 332. \$134.
 — v. Wade, 3 Cold. 505. §§92, 120, 129, 150, 163.
 Harrisonburg Bk. v. Paul, 75 Va. 594; s. c. 40 Am. Rep. 740. §§9, 98, 105.
 Harrold v. Owen (Mich.), 31 N. W. Repr. 420. \$205.
 Harshburger v. Foreman, 81 Ill. 364. \$20.
 Hart v. Caffery, 39 La. Ann. 894. \$173.
 — v. Carpenter, 24 Conn. 427. \$249.
 — v. Farmers' Bank, 33 Vt. 252. §§154, 224, 238.
 — v. Felder, 4 Desaus. Eq. 202. \$212.
 Hartley v. Ferrell, 9 Fla. 374. \$105.
 — v. Frosh, 6 Tex. 208; s. c. 55 Am. Dec. 772. §§89, 121.

- Harton v. Hagler, 1 Hawks. 48. §69.
 Hartshorn v. Dawson, 79 Ill. 108. §§82, 112.
 Harty v. Ladd, 3 Or. 353. §105.
 Harvey v. Crane, 2 Biss. 496. §213.
 — v. Cummings, 68 Tex. 599. §§83, 128.
 Haseltine v. Espey, 13 Or. 301. §§31, 137.
 Hasselman v. McKernan, 50 Ind. 441. §174.
 Hassler v. King, 9 Gratt. 115. §66.
 Hastings v. Cutler, 24 N. H. (4 Fost.), 483. §§92, 145, 159, 221, 223.
 — v. Nissen (Neb.), 31 Fed. Repr. 597. §184.
 — v. Vaughan, 5 Cal. 315. §§8, 52, 56, 73.
 Hatch v. Bigelow, 39 Ill. 546. §233.
 — v. Haskins, 17 Me. 391. §140.
 Hathaway v. Howell, 54 N. Y. 97. §256.
 Hathorn v. Maynard, 65 Ga. 168. §154.
 Haughwout v. Murphy, 21 N. J. Eq. 118. §§204, 205, 206.
 Hausman v. Keigwin, 39 Tex. 34. §202.
 Havens v. Bliss, 26 N. J. Eq. 363. §12.
 Hawk v. Senseman, 6 Serg. & R. 21. §235.
 Hawkins v. Burress, 1 Har. & J. 513. §§5, 108.
 Hawley v. Bennett, 5 Paige, 104. §§13, 166.
 — v. Bullock, 29 Tex. 223. §§134, 204, 225, 228.
 Haworth v. Taylor, 108 Ill. 275. §140.
 Hay v. Hill, 24 Wis. 285. §140.
 Hayden v. Bucklin, 9 Paige, 572. §43.
 — v. Wescott, 11 Conn. 129. §§76, 78.
 Hayes v. Frey, 54 Wis. 503. §100.
 — v. Wilcox, 61 Iowa, 732. §253.
 Hayman v. Jones, 7 Hun, 238. §254.
 Hayner v. Eberheart, 37 Kan. 308. §170.
 Haynsworth v. Bischoff, 6 S. Car. 159. §209.
 Hays v. Mercer, 22 Neb. 656. §46.
 — v. Pacific, etc., Co., 17 How. 596. §275.
 Haywood v. Nat. Ins. Co., 52 Mo. 181. §§241, 244.
 Hazard v. Cole, 1 Idaho. 276. §169.
 Heacock v. Lubuke, 107 Ill. 396. §187.
 Head v. Fordyce, 17 Cal. 149. §45.
 — v. Goodwin, 37 Me. 181. §§16, 140, 150, 236, 255, 272.
 Hearn v. Smith, 59 Ga. 704. §127.
 Heaton v. Prather, 84 Ill. 330. §§35, 164, 177, 182, 187.
 Hector v. Glasgow, 79 Pa. St. 79. §68.
 — v. Knox, 63 Tex. 613. §118.
 Hedger v. Ward, 15 B. Mon. 106. §65.
 Heflin v. Slay, 78 Ala. 180. §255.
 Hegler v. Eddy, 53 Cal. 597. §249.
 Heidenheimer v. McKeen, 63 Tex. 229. §182.
 — v. Thomas, 63 Tex. 287. §118.
 Heil v. Redden, 38 Kan. 255. §78.
 Heilbrun v. Hammond, 13 Hun, 474. §§55, 65.
 Heinbockel v. Zugbaum, 5 Mont. 344; s. C. 51 Am. Rep. 59. §249.
 Heine v. Ellis, 49 Mich. 241. §43.
 Heinrich v. Simpson, 66 Ill. 57. §113.
 Heinrichs v. Wood, 7 Mo. App. 236. §211.
 Heister v. Green, 48 Pa. St. 962. §20.
 Heistner v. Fortner, 2 Binn. 40; s. C. 4 Am. Dec. 417. §§8, 10, 25, 192.
 Helm v. Helm, 11 Kan. 19. §108.
 Helmer v. Krolick, 36 Mich. 371. §204.
 Henderson v. Downing, 24 Miss. 106. §199.
 — v. Grewell, 8 Cal. 581. §§53, 81.
 — v. Morgan, 26 Ill. 431. §246.
 — v. Pilgrim, 22 Tex. 464. §§33, 174.
 — v. Rice, 1 Coldw. 223. §§108, 109.
 — v. Smith, 23 W. Va. 829; s. C. 53 Am. Rep. 139. §89.
 — v. Terry, 62 Tex. 281. §89.
 Hendley v. Howe, 22 Me. 560. §143.
 Hendon v. White, 52 Ala. 597. §§54, 145, 163.
 Hendrickson v. Wooley, 39 N. J. Eq. (12 Stew), 307. §169.

- Hendrickson's Appeal, 24 Pa. St. 363. §§31, 32, 168, 169.
- Hendry v. Smith, 49 Hun, (56 N. Y. Sup. Ct.), 510. §204.
- Henisler v. Nickum, 38 Md. 270. §172.
- Henning v. Fisher, 6 W. Va. 238. §64.
- Henry v. Raiman, 25 Pa. St. 354; s. c. 64 Am. Dec. 703. §204.
- Henshaw v. Sumner, 23 Pick. (40 Mass.), 446. §253.
- Herbert v. Herbert, Breese, 354; s. c. 12 Am. Dec. 192. §144.
- v. Mechanics' Ass'n, 2 C. E. Green, 497; s. c. 90 Am. Dec. 601. §§192, 199.
- Herkelrath v. Stookey, 58 Ill. 21. §246.
- Herman v. Deming, 44 Conn. 124. §147.
- v. Oberdorfer, 33 Gratt. 497. §214.
- Herndon v. Bascom, 8 Dana, 113. §29.
- v. Kimball, 7 Ga. 472. §55.
- Herring v. Cannon, 21 S. Car. 212. s. c. 53 Am. Rep. 661. §251.
- v. Happort, 15 N. Y. 409. §248.
- Herrington v. Williams, 31 Tex. 448. §§19, 36.
- Herryford v. Davis, 102 U. S. 235. §247.
- Hervey v. R. I. Locomotive Works, 93 U. S. 664. §§250, 267.
- v. Smith, 22 Beav. 299. §221.
- Hetherington v. Clark, 30 Pa. St. 393. §162.
- Hetzel v. Barber, 69 N. Y. 1. §160.
- Hewes v. Wiswell, 8 Me. 94. §237.
- Hewitt v. Loosemore, 9 Hare, 449. §§221, 227, 228, 238, 243.
- Hevder v. Excelsior Ass'n, 42 N. J. Eq. 403; s. c. 59 Am. Rep. 49. §175.
- Hibbard v. Zenor, 75 Iowa, 471. §143.
- Hibberd v. Smith, 50 Cal. 511. §42.
- Hickman v. Link, 97 Mo. 482. §234.
- v. Perrin, 6 Cold. 135. §§30, 140.
- Hicks v. Ross, 71 Tex. 358. §246.
- v. Williams, 17 Barb. 523. §§265, 275.
- Hiern v. Mill, 13 Ves. 120. §177.
- Higgins v. Johnson, 20 Tex. 393; s. c. 70 Am. Dec. 394. §182.
- Higgings v. Lodge, 68 Md. 229; s. c. 6 Am. St. Rep. 437. §245.
- High v. Batts, 10 Yerg. 335. §§203, 204, 205.
- Hightower v. Stiffler, 21 Md. 338; s. c. 83 Am. Dec. 593. §90.
- v. Wells, 6 Yerg. 249. §130.
- Hiles v. La Flesh, 59 Wis. 465. §§76, 113.
- Hill v. Ahern, 135 Mass. 148. §201.
- v. Bacon, 43 Ill. 477. §68.
- v. Barlow, 6 Rob. 142. §144.
- v. Epley, 31 Pa. St. 335. §§153, 219.
- v. McCarter, 27 N. J. Eq. 41. §162.
- v. McNichol, 76 Me. 314. §16.
- v. Meaker, 24 Conn. 211. §184.
- v. Moore, 62 Tex. 610, 615. §§219, 221, 223.
- v. Samuel, 21 Miss. 307. §54.
- Hillegas v. Hartley, 1 Hill Ch. 106. §§69, 128, 186.
- Hilton v. Young, 73 Cal. 196. §§2, 37, 216.
- Hinchliff v. Hinman, 18 Wis. 135. §56.
- Hinchman v. Town, 10 Mich. 508. §31.
- Hinde v. Longworth, 1. Wheat. 199. §57.
- v. Vattier, 7 Pet. (32 U. S.), 252. §223.
- Hine v. Dodd, 2 Atk. 275. §§216, 220.
- v. Roberts, 8 Conn. 347. §16.
- Hines v. Perry, 25 Tex. 443. §§219, 223.
- Hinson v. Bailey, 73 Iowa, 544. §144.
- Hinterminster v. Lane, 27 Hun, 497. §250.
- Hinton v. Leigh, 102 N. C. 28. §217.
- Hirschorn v. Conway, 98 Mass. 149. §249.
- Hiss v. McCabe, 45 Md. 77. §78.
- Hitz v. Jenks, 123 U. S. 298. §§52, 54, 87, 89, 98, 121.
- v. National Bk., 111 U. S. 722. §198.
- Hoadley v. Hadley, 48 Ind. 452. §255.
- Hoag v. Howard, 55 Cal. 564. §§10, 166.
- Hoban v. Piquette, 52 Mich. 346. §57.

- Hobson v. Kissam, 8 Ala. 357. §§52, 79, 81, 84.
Hockenhull v. Inman, 80 Ga. 89. §133.
Hodge v. Amerman, 40 N. J. Eq. (13 Stew.). 99. §228.
Hodges v. Powell, 96 N. C. 64. §119.
—— v. Spicer, 79 N. C. 223. §§189, 216, 217.
Hodgson v. Butts, 3 Cranch, 140. §§126, 128, 218.
—— v. Warner, 60 Ind. 214. §249.
Hofer's Appeal, 116 Pa. St. 360. §46.
Hoffman v. Blume, 64 Tex. 334. §230.
—— v. Mackall, 5 O. St. 124; s. c. 64 Am. Dec. 637. §151.
—— v. Wilhelm, 68 Iowa, 510. §175.
Hog v. Perry, 1 Lit. 172. §132.
Hogan v. Hogan, 89 Ill. 427. §98.
—— v. Strayhorn, 65 N. C. 279. §3.
Hogans v. Carruth, 19 Fla. 752. §67.
Hogden v. Guttery, 58 Ind. 431. §4.
Holt v. Remick, 11 N. H. 285. §261.
—— v. Russel, 56 N. H. 559. §216.
Holbrook v. Dickinson, 56 Ill. 497. §4.
Holcombe v. Ray, 1 Ired. L. 340. §§32, 139.
Holdeman v. Knight, Dallam, Tex., 556. §55.
Holden v. Garrett, 23 Kan. 98. §§10, 192, 212.
—— v. N. Y. Bank, 72 N. Y. 286. §§241, 242, 243.
Holladay v. Cromwell, 26 Tex. 189. §71.
—— v. Daily, 1 Colo. 460. §§53, 246.
—— v. ———, 19 Wall. 609. §116.
Holland v. Carter, 79 Ga. 139. §56.
Holley v. Hawlev, 39 Vt. 525; s. c. 94 Am. Dec. 350. §163.
Holliday v. Franklin, 16 Ohio, 533. §217.
Hollingsworth v. Flint, 101 U. S. 591. §§56, 119.
—— v. McDonald, 2 Har. & J. 230; s. c. 3 Am. Dec. 540. §§79, 108, 120.
Holloway v. Platner, 20 Iowa, 121; s. c. 89 Am. Dec. 517. §147. .
- Holman v. Doran, 56 Ind. 358. §§255, 256.
Holmes v. Buckner, 67 Tex. 107. §§154, 158, 159, 162, 200, 212.
—— v. Coryelle, 58 Tex. 685. §126.
—— v. Johns, 56 Tex. 52. §184.
—— v. Powell, 8 De G. M. & G. 572. §228.
—— v. Sprowl, 31 Me. 73. §§143, 255.
—— v. Stout, 10 N. J. Eq. (2 Stockt. Ch.), 419; 3 Green's Ch. 492. §§155, 233.
Home Build. Ass'n v. Clark, 43 O. St. 427. §§12, 165, 189, 219.
Homeopathic Co. v. Marshall, 32 N. J. Eq. 106. §§68, 89, 90, 98, 102, 117.
Homer v. Schonfield, 84 Ala. 313. §108.
Honore v. Bakewell, 6 B. Mon. 67; s. c. 43 Am. Dec. 147. §216.
—— v. Wilshire, 109 Ill. 103. §52.
Hood v. Brown, 2 Ohio, 266. §190.
—— v. Fahnestock, 8 Watts, 489. §§225, 241.
—— v. Mathers, 2 Mar. (Ky.), 558. §56.
Hooker v. Hammill, 7 Neb. 231. §246.
—— v. Pierce, 2 Hill, 650. §157.
Hope Fire Ins. Co. v. Cambrelling, 1 Hun, 493. §§170, 242.
Hope v. Liddell, 21 Beav. 183. §181.
—— v. Sawyer, 14 Ill. 254. §62.
Hopkins v. Delaney, 8 Cal. 85. §77.
—— v. Garrard, 7 B. Mon. 312. §231.
—— v. Menderback, 5 Johns. 234. §§65, 68.
Hoppin v. Doty, 25 Wis. 573. §§179, 222.
Hoppock v. Johnson, 14 Wis. 303. §240.
Hord v. Taubman, 79 Mo. 101. §117.
Hordin v. Sparks, 70 Tex. 429. §127.
Hornbeck v. Building Association, 88 Pa. St. 64. §§68, 77, 82, 107.
Horner v. Stout, 5 Colo. 166. §§245, 254.
Horsley v. Garth, 2 Gratt. 471; s. c. 44 Am. Dec. 393. §§16, 84, 134, 272.
—— v. Hairsine (Iowa), 41 N. W. Repr. 579. §248.
Horton v. Bond, 28 Gratt. 815. §214.

- Horton v. Crawford, 10 Tex. 338. §234.
 — v. Cutler, 28 La. Ann. 331. §175.
 — v. Williams, 21 Minn. 187. §§41, 254.
 Hosier v. Hall, 2 Ind. 556; s. c. 54 Am. Dec. 460. §212.
 Hoskinson v. Adkins, 77 Mo. 537. §§9, 97.
 Host v. Remick, 11 N. H. 285. §265.
 Hottenstein v. Lerch, 104 Pa. St. 454. §§225, 228.
 Houfes v. Schultze, 2 Bradw. (Ill.), 196. §168.
 Houghton v. Burnham, 22 Wis. 301. §§140, 255.
 — v. Jones, 1 Wall. 702. §56.
 — v. Mariner, 7 Wis. 244. §43.
 Housatonic Bk. v. Martin, 1 Met. (44 Mass.), 294. §244.
 House v. Beatty, 7 O. St. 84. §222.
 Houseman v. Mut. Build. Ass'n, 81 Pa. St. 256. §§241, 244.
 Houston v. Blythe, 71 Tex. 719. §187.
 — v. Houston, 67 Ind. 276. §172.
 — v. Stanton, 11 Ala. 412. §144.
 Hovey v. Blanchard, 13 N. H. 145. §221.
 Howard v. Chase, 104 Mass. 249. §§31, 41, 170, 171, 181, 269.
 — v. Colquhoun, 28 Tex. 134. §§95, 129.
 — v. Halsey, 4 Sandf. 565; s. c. 8 N. Y. 271. §181.
 — Ins. Co. v. Halsey, 8 N. Y. 271; s. c. 59 Am. Dec. 478. §§162, 163, 164.
 — v. McIntyre, 3 Allen, 572. §65.
 — v. Most, 64 N. Y. 268. §§97, 120.
 — v. Selman, 77 Ga. 604. §154.
 Howe v. Thayer, 49 Iowa, 154. §142.
 — v. Wildes, 34 Me. 566. §101.
 Howell v. Howell, 7 Ired. 491. §172.
 — v. McCrie, 36 Kan. 636. §119.
 — v. Ray, 92 N. C. 510. §130.
 Hoy v. Allen, 27 Iowa, 208. §§10, 192, 199.
 — v. Bramhall, 19 N. J. Eq. 593; s. c. 97 Am. Dec. 687. §§182, 219.
 Hoyt v. Jones, 31 Wis. 389. §§154, 162.
 Hoxie v. Carr, 1 Sum. 173. §224.
 Hronske v. Janke, 66 Wis. 252. §130.
- Hubbard v. Andrews, 76 Ga. 177. §§246, 266, 267.
 — v. Turner, 2 McLean, 533. §33.
 — v. Walker, 19 Neb. 94. §198.
 Hubbardson Lumber Co. v. Covert, 35 Mich. 254. §§41, 264.
 Huber v. Bossart, 70 Iowa, 718. §162.
 Huck v. Gaylord, 50 Tex. 582. §45.
 Hudson v. Isbell, 5 Stew. & Port. 67. §231.
 — v. Warner, 2 Har. & Gill, 415. §§182, 209, 226, 227.
 Huffman v. Blum, 64 Tex. 334. §209.
 — v. Huffman, 118 Pa. St. 458. §§94, 99.
 Huff v. Farwell, 67 Iowa, 298. §§175, 244.
 — v. Webb, 64 Tex. 284. §§81, 82, 83.
 Hughes v. Cannon, 2 Humph. 589. §23.
 — v. Coleman, 10 Bush, 248. §§87, 90.
 — v. Debnamy, 8 Jones, 127. §17.
 — v. Lane, 11 Ill. 123. §110.
 — v. Menifee, 29 Mo. App. 192. §§41, 218, 223, 254, 269.
 — v. United States, 4 Wall. 232. §§221, 233.
 — v. Wilkinson, 37 Miss. 482. §29, 65.
 Hulett v. Mut. Ins. Co., 114 Pa. St. 142. §154.
 Hulings v. Guthrie, 4 Pa. St. 123. §198.
 Hull v. Noble, 40 Me. 459, 480. §216.
 — v. Powell, 4 Serg. & R. 465. §234.
 — v. Sullivan, 63 Ga. 126. §§171, 181.
 Hulsizer v. Opdyke (N. J.), 13 Atl. Repr. 669. §269.
 Hultz v. Ackley, 63 Pa. St. 142. §74.
 Humphries v. Bartee, 10 Sm. & Mar. 282. §§137, 247.
 — v. Merrill, 52 Miss. 92. §10.
 Humphreys v. Newman, 51 Me. 40. §178.
 Hundley v. Mount, 8 Sm. & M. 387. §134.
 Hunsinger v. Hoffer, 110 Ind. 390. §205.

- Hunt v. Bay State Iron Co., 97 Mass. 279. §254.
 — v. Bowen, 75 Ga. 662. §§246, 262.
 — v. Bullock, 23 Ill. 320. §253.
 — v. Dunn, 74 Ga. 120. §§168, 182, 219.
 — v. Grant, 19 Wend. 90. §42.
 — v. Johnson, 19 N. Y. 279. §§39, 77.
 — v. Thompson, 19 N. Y. 279. §§3, 56, 61, 128.
 Hunter v. Watson, 12 Cal. 373; s. c. 73 Am. Dec. 543. §§189, 207, 221.
 Hunton v. Nichols, 55 Tex. 217. §21.
 Hurd, v. Brown, 37 Mich. 384. §§137, 255.
 Hurry v. Hurry, 2 Wash. 145. §276.
 Hurst v. McNeil, 1 Wash. C. Ct. 70. §203.
 Hurt v. Cooper, 63 Tex. 362. §§230, 231.
 — v. McCartney, 18 Ill. 129. §80.
 Huston v. Curl, 8 Tex. 239; s. c. 58 Am. Dec. 110. §182.
 Hutchins v. Bacon, 46 Tex. 409. §§96, 219.
 — v. Chapman, 37 Tex. 612. §205.
 — v. Field, 10 La. Ann. 237. §210.
 Hutchinson v. Ainsworth, 63 Cal. 286. §§91, 107.
 — v. Swartseller, 31 N. J. Eq. 205. §175.
 Hutchison v. Rust, 2 Gratt. 394. §87.
 Hutzler v. Phillips, 26 S. Car. 136. §39.
 Huyler v. Dahoney, 48 Tex. 239. §206.
 Hyatt v. Cochran, 69 Ind. 436. §187.
 Hyde v. Noble, 13 N. H. 494; s. c. 32 Am. Dec. 538. §247.
- I.**
- Iglehart v. Crane, 42 Ill. 261. §§21, 162.
 Illinois Central v. McCullough, 59 Ill. 166. §231.
 — v. Hawkins, 65 Miss. 200. §389.
 Illinois Central v. Johnson, 40 Ill. 35. §74.
 Ing v. Brown, 3 Md. Ch. 521. §§137, 255.
 Ingalls v. Newhall, 139 Mass. 268. §§27, 183.
 Ingersoll v. Sergeant, 7 Barr, 340; 3 Harris, 343. §35.
 Ingraham v. Grigg, 13 S. & M. 22. §83.
 Ingram v. Morgan, 4 Humph. 66. §208.
 In re Bright's Trusts, 21 Beav. 430. §§182, 223.
 — Collins, 8 Ben. 59. §213.
 — Collins, 12 Blatch. 548. §213.
 — 254.
 — Driscoll, 1 I. R. Eq. 285. §2.
 — Griffiths, 1 Lowell, 431. §213.
 — Gurney, 7 Biss. 414. §213.
 — Guyer, 69 Iowa, 585. §256.
 — Leland, 10 Blatchf. 503. §§246, 257.
 — Pearl Street, 111 Pa. St. 565. §49.
 — Soldiers' Business, etc., Co., 3 Ben. 204. §264.
 — Werner, 5 Dill. 119. §§213, 254.
 — Wynne, Chase's Dec. 227. §213.
 Ins. Co. v. Eldredge, 102 U. S. 545. §175.
 — v. Nelson, 103 U. S. 544. §§87, 108.
 — v. Scales, 27 Wis. 640. §17.
 Insolvent Est. of Leiman, 32 Md. 225. §217.
 Int. Wrecking Co. v. McMorran (Mich.), 41 N. W. Repr. 510. §244.
 Iowa Loan & Trust Co. v. King, 58 Iowa, 598. §235.
 Irish v. Sharp, 89 Ill. 261. §§36, 39.
 Irving v. Brownell, 11 Ill. 402. §§70, 74, 84.
 — v. Smith, 17 Ohio, 226. §§131, 132, 191.
 Irwin v. Dixon, 9 How. 30. §49.
 — v. Jeffers, 3 Ohio St. 389. §191.
 — v. Welch, 10 Neb. 479. §§55, 75.
 Isham v. Bennington, 19 Vt. 251. §60.
 Ives v. Kimball, 1 Mich. 308. §80.
 — v. Stone, 51 Conn. 446. §§31, 32, 139.

Ivey v. Petty, 70 Tex. 178. §234.

J.

Jackman v. Gloucester, 143 Mass. 380. §46.

Jackson v. Allen, 30 Ark. 110. §§54, 189.

— v. Austin, 15 Johns. 477. §169.

— v. Bain, 74 Ala. 328. §273.

— v. Blackwood, 4 MacArth. 188. §176.

— v. Burgott, 10 Johns. 457. §§189, 201.

— v. Center, 19 Johns. 281. §§13, 166.

— v. Chamberlain, 8 Wend. 625. §§3, 199.

— v. Colden, 4 Cow. 266. §§65, 87, 99.

— v. Cunningham, 28 Mo. App. 354. §24.

— v. Davidson (Mich.), 32 N. W. Repr. 726. §43.

— v. Dennison, 4 Wend. 558. §28.

— v. Dubois, 4 Johns. 216. §§101, 212.

— v. Gilchrist, 15 Johns. 89. §§93, 95.

— v. Given, 8 Johns. 137. §§4, 155.

— v. Gould, 7 Wend. 366. §129.

— v. Gumaer, 2 Cow. 552. §77.

— v. Harby, 65 Tex. 710. §210.

— v. Humphreys, 1 Johns. 498. §65.

— v. Lamphire, 3 Pet. 280. §§23, 174.

— v. Livingston, 6 Johns. 149. §128.

— v. McChesney, 7 Cow. 360. §155.

— v. McKenny, 3 Wend. 233. §172.

— v. Osborn, 2 Wend. 555; s. c. 20 Am. Dec. 649. §§77, 128, 129.

— v. Phipps, 12 Johns. 418. §144.

— v. Post, 9 Cow. 120. §14.

— v. —, 15 Wend. 588. §156.

— v. Rice, 3 Wend. 180. §§56, 134.

— v. Richards, 6 Cow. 617. §§190, 209.

Jackson v. Schoonmaker, 4 Johns. 161. §66.

— v. Shephard, 2 Johns. 77. §56.

— v. Town, 4 Cow. 405. §156.

— v. Van Valkenburgh, 8 Cow. 260. §§4, 225, 227.

— v. Waldron, 13 Wend. 178. §128.

— v. Warford, 7 Wend. 62. §234.

— v. Warren, 32 Ill. 331. §50.

— v. Winslow, 9 Cow. 13. §205.

— v. Woodruff, 4 Cow. 276. §234.

Jacobs v. Dennison, 141 Mass. 117. §§148, 272.

Jacoby v. Crowe, 36 Minn. 93. §172.

Jacoway v. Gault, 20 Ark. 190; s. c. 73 Am. Dec. 494. §§52, 79, 81, 217.

Jacques v. Weeks, 7 Watts, 261. 267. §§32, 36, 73, 138, 199, 225, 236.

James v. Brown, 11 Mich. 25. §§162, 164.

— v. Johnson, 6 Johns. Ch. 417. §33.

— v. Morey, 2 Cow. 246; s. c. 14 Am. Dec. 475. §§6, 28, 136, 138, 209.

— v. Stiles, 14 Pet. 322. §§59, 78.

Jamison v. Jamison, 3 Whart. 457; s. c. 31 Am. Dec. 536. §87.

Janes v. Penny, 76 Ga. 796. §§127, 133.

Jansen v. McCahill, 22 Cal. 563; s. c. 83 Am. Dec. 84, 593. §§90, 106.

Janvrin v. Fogg, 49 N. H. 340. §247.

Jaques v. Lester, 118 Ill. 246. §228.

Jarman v. Farley, 7 Lea, 141. §203.

Jarrell v. Jarrell, 27 W. Va. 743. §90.

Jarvis v. Aikens, 25 Vt. 685. §161.

— v. Dutcher, 16 Wis. 307. §39.

Jefferson v. Oyler, 82 Ind. 394. §233.

— Co. v. Heil, 81 Ky. 513. §§14, 41, 98.

Jenkins v. Adams, 71 Tex. 1. §§162, 178.

— v. Nelson, 11 Mart. 437. §§45, 173.

- Jennings v. Gage, 13 Ill. 310. §§245, 250.
- Jerrard v. Saunders, 2 Ves., Jr., 454. §14.
- Jessup v. City Bk., 15 Wis. 604. §191.
- Jewett v. Palmer, 7 Johns. Ch. 65. §204.
- v. Tucker, 139 Mass. 566. §207.
- J. I. Case Threshing Co. v. Smith, 16 Or. 381. §258.
- Joerdens v. Schrimpf, 77 Mo. 383. §175.
- Johns v. Scott, 5 Md. 81. §§52, 189.
- Johnson v. Badger, etc., Co., 3 Nev. 351. §§79, 82.
- v. Brown, 25 Tex. Sup. 126. §40.
- v. Bryan, 62 Tex. 623. §§93, 99.
- v. Burden, 40 Vt. 567; s. c. 94 Am. Dec. 436. §§16, 27, 87, 144, 148, 187, 256, 271.
- v. Bush, 3 Barb. Ch. 207. §60.
- v. Clark, 18 Kan. 157, 164. §222.
- v. Farley, 45 N. H. 505. §141.
- v. Graves, 27 Ark. 557. §207.
- v. Grissard, 51 Ark. 410. §273.
- v. Jeffries, 30 Mo. 423. §§41, 254.
- v. McGehee, 1 Ala. 186. §131.
- v. Merrill, 122 Mass. 153. §275.
- v. Moser, 72 Iowa, 654. §251.
- v. Newman, 43 Tex. 628. §14.
- v. Parker (Ark.), 11 S. W. Repr. 681. §§115, 120.
- v. Patterson, 2 Woods, 443. §§41, 213, 255.
- v. Prewitt, 32 Mo. 553. §129.
- v. Richardson, 44 Ark. 365. §§97, 120.
- v. Shortridge, 93 Mo. 227. §244.
- v. Stagg, 2 Johns. 510. §30.
- v. Taylor, 60 Tex. 360. §§91, 94, 97, 120.
- v. Thweatt, 18 Ala. 741. §176.
- v. Turner, 7 Ohio, 216. §127.
- v. Van Velsor, 43 Mich. 208. §§89, 121.
- Johnson v. Walton, 1 Sneed, 258. §§99, 101, 186.
- v. Wheelock, 63 Ga. 623. §§154, 209.
- v. Williams, 37 Kan. 179; s. c. 1 Am. St. Rep. 243. §183.
- Co. v. Thayer, 5 Cent. Law J. 245. §208.
- Johnston v. Gwathmey, 4 Litt. 317; s. c. 14 Am. Dec. 135. §§181, 216.
- v. Haines, 2 Ohio. 55; s. c. 15 Am. Dec. 533. §§61, 71.
- v. Irwin, 3 Serg. & R. 291. §231.
- v. Wallace, 53 Miss. 331; s. c. 24 Am. Rep. 699. §§89, 90, 98, 121.
- v. Williams, 37 Kan. 179; s. c. 1 Am. St. Rep. 243. §27.
- Jolland v. Stainbridge, 3 Ves., Jr., 478. §225.
- Jones v. Bach, 48 Barb. 568. §76.
- v. Berkshire, 15 Iowa. 248; s. c. 83 Am. Dec. 412. §§75, 143, 158.
- v. Chamberlain, 5 Heisk. (Tenn.), 210. §34.
- v. Cohen, 82 N. C. 75. §121.
- v. Crosshwaite, 17 Iowa, 393. §101.
- v. Goff, 63 Tex. 255. §§110, 117.
- v. Graham, 77 N. Y. 628. §§196, 254.
- v. Gurtie, 61 Miss. 423. §121.
- v. Hough, 77 Ala. 477. §130.
- v. Hudson, 23 S. Car. 494. §32.
- v. Jenkins, 83 Ky. 391. §24.
- v. Johnston, 18 How. 150. §49.
- v. Keen, 115 Mass. 170. §276.
- v. Lewis, 8 Ired. L. 70. §§69, 109.
- v. Loftin, 16 Fla. 189. §56.
- v. Marks, 47 Cal. 242. §216.
- v. Martin, 16 Cal. 166. §150.
- v. McNarrin, 68 Me. 334; s. c. 28 Am. Rep. 66. §§17, 43.
- v. Menard, 1 Tex. 771. §234.
- v. Montes, 15 Tex. 351. §96.
- v. Morey, 2 Cow. 246; s. c. 14 Am. Dec. 475. §32.
- v. Parks, 22 Ala. 446. §78.
- v. Phelps, 2 Barb. Ch. 440. §§31, 170.
- v. Porter, 59 Miss. 628. §§35, 67.

Jones v. Powers, 65 Tex. 207. §§134, 188.
 — v. Roberts, 65 Me. 273. §144.
 — v. Ruffin, 3 Dev. 404. §127.
 — v. Shaddock, 41 Ala. 362. §210.
 — v. Smith, 1 Hare. 43. §§181, 182, 220, 221, 223, 228, 236, 237.
 — v. Taylor, 7 Tex. 240. §100.
 — v. Williams, 24 Beav. 47. §223.
 Jordan v. Corey, 2 Ind. 385; s. c. 52 Am. Dec. 517. §§91, 94, 103.
 — v. Farnsworth, 15 Gray, 517. §§152, 220, 255.
 — v. McNeill, 25 Kan. 459. §§10, 209.
 — v. Robson, 27 Tex. 612. §56.
 Jourdan v. Jourdan, 9 Serg. & R. 268; s. c. 11 Am. Dec. 724. §§87, 90, 105, 119.
 Journeay v. Gibson, 56 Pa. St. 57. §§97, 120.
 Jumel v. Jumel, 7 Paige, 591. §178.

K.

Kaiser v. Leinbeck, 3 Iowa, 520. §172.
 Kanaga v. Taylor, 7 O. St. 134; s. c. 70 Am. Dec. 62. §§246, 261, 265, 266, 267.
 Kane v. Rice, 10 Nat. Bank Reg. 469. §264.
 — v. Roberts, 40 Md. 590. §194.
 Kansas City Land Co. v. Hill, 87 Tenn. 589. §49.
 Karns v. Olney, 80 Cal. 90. §294.
 Kauffelt v. Bower, 7 Serg. & R. 64. §20.
 Kauffman v. Robey, 60 Tex. 308. §§238, 241.
 Kavanaugh v. Day, 10 R. I. 393. §§107, 109.
 Kay v. Jones, 7 J. J. Marsh. 38. §115.
 Kearnes v. Hill, 21 Fla. 185. §154.
 Kearney v. Macomb, 16 N. J. Eq. 189. §117.
 — v. Taylor, 15 How. 517. §120.
 Kedder v. Stevens, 60 Cal. 414. §144.
 Keeley v. Hannah, 52 Mich. 635. §175.
 Keen v. Coleman, 3 Wright, 299. §87.

Keichline v. Keichline, 54 Pa. St. 76. §§56, 69.
 Keiser v. Houston, 38 Ill. 252. §6.
 Keith v. Bingham, 97 Mo. 196. §209.
 — v. Catchings, 64 Ga. 773. §139.
 Keller v. Nutz, 5 Serg. & R. 246. §§159, 162.
 — v. Paine, 107 N. Y. 83. §276.
 — v. Smalley, 63 Tex. 519. §§41, 211, 254.
 Kelley v. Calhoun, 95 U. S. 710. §§3, 60, 69, 77, 79.
 — v. Mills, 41 Miss. 267. §§19, 20, 36, 42, 192, 196, 199, 212.
 — v. Rosenstock, 45 Md. 389. §84.
 — v. Stanberry, 13 Ohio, 408, 426. §222.
 — v. Whitmore, 41 Tex. 648. §118.
 — v. Whitney, 45 Wis. 110. §204.
 Kelly v. Boylan, 32 N. J. Eq. 581. §252.
 — v. Reid, 57 Miss. 89. §253.
 — v. Thompson, 2 Heisk. 281. §38.
 Kellogg v. Vickory, 1 Wend. 406. §129.
 Kelsey v. Kendall, 48 Vt. 24. §251.
 Kemp v. Earp, 7 Ired. Eq. 167. §231.
 — v. Porter, 7 Ala. 138. §62.
 Kemper v. Campbell, 44 O. St. 210. §§31, 132, 133, 137, 139.
 Kendall v. Lawrence, 22 Pick. (39 Mass.), 540. §§236, 237.
 — v. Miller, 9 Cal. 591. §105.
 Kenedy v. Northrup, 15 Ill. 158. §184.
 Kennedy v. Daly, 1 Sch. & Lef. 355. §155.
 — v. Green, 3 My. & K. 699. §§22, 238, 242, 243.
 — v. House, 41 Pa. St. 39; s. c. 80 Am. Dec. 594. §46.
 — v. Shaw, 38 Ind. 474. §§41, 269.
 — v. Ten Broeck, 11 Bush. 250. §90.
 Kenyon v. Stewart, 44 Pa. St. 179. §3.
 Keohane v. Smith, 97 Ill. 156. §175.
 Kerfoot v. Cronin, 105 Ill. 609. §162.

- Kerns v. Swope, 2 Watts, 75. §§134, 149, 159.
- Kerr v. Day, 14 Pa. St. 112. §§227, 228, 236.
- v. Kitchen, 17 Pa. St. 433. §181.
- v. Moon, 9 Wheat. 565. §§11, 50.
- v. Russell, 69 Ill. 666; s. c. 18 Am. Rep. 634. §§68, 89, 98, 121.
- v. Watts, 6 Wheat. 550. §135.
- Keryea v. Berry, 84 Ill. 600. §187.
- Kesner v. Trigg, 98 U. S. 50. §§35, 210.
- Kessler v. State, 24 Ind. 213. §16.
- Ketcham v. Wood, 22 Hun, 64. §164.
- Ketchum v. Brennan, 53 Miss. 596. §247, 249.
- v. Watson, 24 Ill. 591. §250.
- Key v. Brown, 67 Tex. 300. §250.
- Keys v. Test, 33 Ill. 316. §205.
- Kezartee v. Marks, 15 Or. 529. §46.
- Kilbourn v. Fury, 26 O. St. 153. §90.
- Kilbourne v. Fay, 29 O. St. 264. §254.
- Kilgore v. Graves, 2 Civ. App. (Tex.), §410. §177.
- Kilpatrick v. Kilpatrick, 23 Miss. 124. §20.
- Kimball v. Blaisdell, 5 N. H. 533. s. c. 22 Am. Dec. 476. §161.
- v. Finner, 12 N. H. 248. §204.
- v. Johnson, 14 Wis. 674. §68.
- v. Sattley, 55 Vt. 285; s. c. 45 Am. Rep. 614. §274.
- v. Semple, 25 Cal. 440. §76.
- King v. Bales, 44 Ind. 219. §92.
- v. Bates, 57 N. H. 446. §281.
- v. Elson, 30 Tex. 246. §96.
- v. Fraser, 23 S. C. 543. §§7, 132, 196, 199, 254.
- v. Merritt (Mich.), 34 N. W. Repr. 689. §§95, 109.
- v. Paulk, 85 Ala. 186. §§192, 198.
- v. Portis, 77 N. C. 25. §§42, 134.
- v. Russell, 40 Tex. 124. §§73, 74, 91.
- Kinney v. Cay, 39 Minn. 210. §251.
- v. Consolidated Mining Co., 4 Saw. 382. §204.
- Kingsland v. Culp, 85 Mo. 548. §251.
- Kingsley v. Holbrook, 45 N. H. 320. §145.
- Kingston Building Ass'n v. Rainsford, 10 U. C. Q. B. 236. §28.
- Kinsman v. Loomis, 11 Ohio, 475. §§65, 68.
- Kirk v. Navigation Co., 49 Tex. 215. §§114, 177, 182.
- Kirkland v. Brune, 31 Gratt. 136. §§214, 246.
- Kirksey v. Bates, 7 Port. 529; s. c. 31 Am. Dec. 722. §§61, 73.
- Kiser v. Henston, 38 Ill. 252. §16.
- Kitchell v. Mudgett, 37 Mich. 81. §§169, 181.
- Kitteridge v. Chapman, 36 Iowa, 348. §§205, 206.
- Klein v. Richardson, 64 Miss. 41. §54.
- Knapp v. Bailey, 79 Me. 164. §§179, 183, 222, 223.
- v. Deitz, 64 Wis. 31. §253.
- Knight v. Bowyer, 2 DeG. & J. 421; s. c. 23 Beav. 600. §§236, 237.
- v. Paxton, 124 U. S. 552. §§9, 98, 101.
- v. Williams, 6 Bush, 51; s. c. 99 Am. Dec. 652. §151.
- Knighton v. Smith, 1 Or. 276. §79.
- Knittel v. Cushing, 57 Tex. 354; s. c. 44 Am. Rep. 598. §§248, 250.
- Knoblock v. Mueller, 17 N. E. Rep. (Ill.), 696. §51.
- Knolls v. Barnhart, 71 N. Y. 424. §144.
- Knorr v. Raymond, 73 Ga. 749, 775. §§178, 181.
- Knowles v. Knowles, 86 Ill. 1. §90.
- v. Masterson, 3 Humph. 619. §246.
- Knowlton v. Walker, 13 Wis. 264. §137.
- Knox v. Silliway, 10 Me. 201. §§154, 158.
- Koch v. Branch, 44 Mo. 542; s. c. 100 Am. Dec. 324. §247.
- Koerper v. St. Paul Ry., 40 Minn. 132. §187.
- Koevenig v. Schmitz, 71 Iowa. 175. §§168, 172.
- Kohl v. Lynn, 34 Mich. 360. §206.
- Koon v. Trammel, 71 Iowa, 132. §230.
- Koplin v. Anderson, 88 Ill. 120. §§55, 148, 246.
- Kottman v. Ayer, 1 Strobb. 552. §§111, 186.

- Kramer v. Arthurs, 7 Barr, 161. §35.
 Krause v. Commonwealth, 93 Pa. St. 418. §250.
 Krider v. Lafferty, 1 Whart. 303. §233.
 Krone v. Phelps, 43 Ark. 350. §273.
 Kubn v. Graves, 9 Iowa, 303. §§138, 255.
 Kunkle v. Wolfersberger, 6 Watts, 126. §205.
 Kurtz v. Hollingshead, 3 Cranch C. Ct. 68. §171.
 Kyle v. Thompson, 11 O. St. 616. §163.
 — v. Ward, 81 Ala. 120. §§219, 223.
- L.**
- Lacey v. Giboney, 36 Mo. 320. §24.
 Ladd v. Campbell, 56 Vt. 529. §§33, 174, 175.
 Ladue v. Detroit & M. R. R., 13 Mich. 380; s. c. 87 Am. Dec. 759. §164.
 La Farge v. Morgan, 11 Mart. (La.), 462. §174.
 La Farge Ins. Co. v. Bell, 22 Barb. 54. §243.
 Lafayette v. Metcalf, 29 Mo. App. 384. §§246, 266, 267.
 La Frombois v. Jackson, 8 Cow. 604. §234.
 Lahr's Appeal, 90 Pa. St. 507. §§172, 216.
 Laidley v. Cent. Land Co., 30 W. Va. 505. §§110, 111.
 — v. Knight, 23 W. Va. 735. §§104, 107.
 Laird v. Scott, 5 Heisk. 314. §§108, 109.
 Lake v. Campbell, 18 Ill. 106. §28.
 Lake View v. LeBahn, 120 Ill. 92. §49.
 Lallane v. Moreau, 13 La. 431. §§50, 51.
 Lally v. Holland, 1 Swan, 396. §§17, 147.
 Lamar v. Hall, 79 Va. 147. §205.
 — v. Raysor, 7 Rich. 509. §§69, 128.
 Lamar Co. v. Clements, 49 Tex. 354. §49.
 Lamb v. Davis, 74 Iowa, 719. §154.
 — v. Pierce, 113 Mass. 72. §§28, 221, 222, 229.
- Lambert v. Newman, 56 Ala. 623. §225.
 — v. Weir, 27 Tex. 359. §§21, 96.
 Lamberton v. Merchant's Bk., 24 Minn. 281. §192.
 Lamont v. Chesire, 65 N. Y. 30. §43.
 — v. Stimson, 5 Wis. 443. §225.
 Lamoreux v. Meyers, 68 Wis. 34. §231.
 Lamorque v. Langston, 8 Mo. 328. §76.
 Lamson v. Moffatt, 61 Wis. 153. §§273, 274.
 Landers v. Bolton, 26 Cal. 393. §§87, 110.
 Land Co. v. Chisholm, 71 Tex. 523. §134.
 Lane v. Dolick, 6 McLean, 200. §115.
 — v. Dushac, 73 Wis. 646. §143.
 — v. Lutz, 1 Keyes, 213. §254.
 — v. Mason, 5 Leigh, 520. §§190, 265.
 — v. McKeen, 15 Me. 304. §117.
 — v. Nelson, 79 Pa. St. 407. §120.
 — v. Schlemmer, 114 Ind. 296; s. c. 5 Am. St. Rep. 621. §§89, 109, 154.
 — v. Shields, 3 Yerg. 405. §78.
 Lang v. Rickmers, 70 Tex. 108. §§249, 250.
 Langton v. Marshall, 59 Tex. 296. §§105, 107.
 Langworthy v. Myers, 4 Iowa, 18. §234.
 Lank v. Hiles, 4 Houst. (Del.), 87. §144.
 Lanning v. Dolph, 4 Wash. C. C. 624. §56.
 Lansing v. Russell, 3 Barb. Ch. 325. §130.
 Larkins v. Saffarans, 15 Fed. Repr. 147. §174.
 Lasell v. Powell, 7 Coldw. 277. §48.
 Lash v. Edgerton, 13 Minn. 210. §31.
 — v. Hardick, 5 Dill. 505. §§191, 196.
 Latch v. Bright, 16 Grant's Ch. 613. §28.
 Lathe v. Schaff, 60 N. H. 34. §262.
 Latouche v. Lord Dunsany, 1 Dr. & War. 459. §2.
 Laughlin v. Tream, 14 W. Va. 322. §110.

- Laverty v. Moore, 33 N. Y. (6 Tiff.), 658; s. c. 32 Barb. 347. §§36, 37.
 Lawrence v. Everts, 7 O. St. 194. §253.
 — v. Hodges, 92 N. C. 672; s. c. 53 Am. Rep. 436. §275.
 — v. Stratton, 6 Cush. 163. §198.
 Lawton v. Gordon, 37 Cal. 202. §224.
 Lazarus v. Henrietta Nat. Bank, 72 Tex. 354. §476.
 Lea v. Polk Co. Copper Co., 21 How. 493. §§84, 154.
 Leach v. Ansbacher, 55 Pa. St. 85. §§205, 228.
 — v. Beattie, 33 Vt. 195. §178.
 — v. Cassidy, 23 Ind. 449. §64.
 Learned v. Allen, 14 Allen, 109. §65.
 — v. Riley, 14 Allen, 109. §68.
 Leathwhite v. Bennett (N. J.), 11 Atl. Repr. 29. §44.
 Lebanon v. Warren Co., 9 Ohio, 80. §49.
 Lecamp v. Carnahan, 26 W. Va. 839. §43.
 Ledos v. Kupfrian, 28 N. J. Eq. 161. §20.
 Ledyard v. Butler, 9 Paige, 132. §156.
 Lee v. Birmingham, 30 Kan. 312. §16.
 — v. Cato, 27 Ga. 637. §§154, 216.
 — v. Clark, 89 Mo. 553. §175.
 — v. Darramon, 3 Rob. 160. §138.
 — v. Munroe, 7 Cranch, 366. §226.
 — v. Phelps, 54 Tex. 368. §47.
 — v. Wharton, 11 Tex. 61. §96.
 Leftwich v. Neal, 7 W. Va. 569. §109.
 Leger v. Doyle, 11 Rich. 118. §133.
 Leggett v. Bullock, Busb. 283. §165.
 Le Gierse v. Moore, 59 Tex. 470. §185.
 Le Grand v. Eufala Bank, 81 Ala. 123; s. c. 60 Am. Rep. 140. §§154, 245.
 Leibe v. Hebersmith, 39 La. Ann. 1050. §§130, 145.
 Leiby v. Wolf, 10 O. 83. §§21, 164. 178.
 Leighton v. Stuart, 19 Neb. 546. §253.
 Leinenkugel v. Kehl, 73 Wis. 238. §54.
 Leinman's Estate, 32 Md. 325. §4.
 Leitch v. Wells, 48 N. Y. 585. §43.
 Leland v. Isenbeck, 1 Idaho, 469. §27.
 — v. The Medora, 2 Woodb. & M. 92. §276.
 Lemay v. Williams, 32 Ark. 166. §254.
 Lemon v. Staats, 1 Cow. 592. §168.
 — v. Waterman, 2 Wash. 485. §§114, 185.
 LeNeve v. LeNeve, Amb. 436; s. c. 1 Ves. 64; 3 Atk. 646. §§1, 99, 165, 200, 216, 220, 242.
 Leonard v. N. Y. Bay Co., 28 N. J. Eq. 192. §191.
 Leonis v. Lazzarovich, 55 Cal. 52. §9.
 Leopold v. Silverman, 7 Mont. 266. §271.
 Leppoc v. Union Bank, 32 Md. 136. §144.
 Leslie v. Hinson, 83 Ala. 266. §§16, 273.
 — v. Richardson, 60 Ala. 563. §191.
 Letcher v. Norton, 5 Ill. 575. §254.
 Levi v. Booth, 58 Md. 305; s. c. 42 Am. Dec. 332, 337. §§247, 248, 250.
 Levitt v. Lamprey, 13 Pick. 383. §115.
 Levy v. Cox, 22 Fla. 546. §144.
 Lewis v. Baird, 3 McLean, 56. §§56, 134.
 — v. Caperton, 8 Gratt. 148. §20.
 — v. Cole, 60 Tex. 341. §184.
 — v. Coxe, 5 Harr. 401. §117.
 — v. Curry, 74 Mo. 49. §67.
 — v. Ferrell, 51 Conn. 216. §175.
 — v. Hinman, 56 Conn. 55. §231.
 — v. Johnson, 68 Tex. 448. §§135, 203.
 — v. Klotz, 39 La. Ann. 259. §§16, 28, 136.
 — v. Palmer, 28 N. Y. 271. §257.
 Libby v. Staples, 39 Me. 166. §251.
 Lickman v. Harding, 65 Ill. 505. §§68, 90.
 Liebrick v. Stahle, 68 Iowa, 515. §236.
 Liggett v. Himle, 38 Minn. 421. §175.

- Liggett v. Wall, 2 A. K. Marsh. 149. §210.
- Lightner v. Mooney, 10 Watts. 407. §§133, 158, 162, 167.
- Lillard v. Ruckers, 9 Yerg. 64. §196.
- Lincoln v. Hass, 10 Neb. 581. §142.
- v. Quinn, 68 Md. 299; s. c. 6 Am. St. Rep. 446. §250.
- v. Thompson, 75 Mo. 613. §§71, 78, 82, 232.
- Lindley v. Cross, 31 Ind. 106; s. c. 99 Am. Dec. 610. §46.
- v. Smith, 46 Ill. 524. §§76, 87, 100, 113, 115.
- Lindsey v. Rankin, 4 Bibb. 282. §155.
- v. Veasey, 62 Ala. 421. §216.
- Link v. Page, 72 Tex. 592. §471.
- Lionberger v. Baker, 88 Mo. 447. §204.
- Lipp v. Land Syndicate, 24 Neb. 692, 699. §228.
- Lissa v. Posey, 64 Miss. 352. §§20, 196, 200.
- Lister v. Allen, 31 Md. 543. §247.
- Little v. Dodge, 32 Ark. 453. §§52, 73.
- v. Weatherford, 63 Tex. 638. §77.
- v. White, 29 S. Car. 170. §129.
- Littleton v. Giddings, 47 Tex. 109. §§178, 182, 216, 219, 224, 226, 227, 239.
- Livingston v. McDonald, 9 Ohio, 168. §66.
- v. Kettelle, 1 Gilm. 116; s. c. 41 Am. Dec. 166. §§52, 70, 76, 77, 80.
- v. Peru, 9 Wend. 511. §234.
- Lloyd v. Banks, L. R. 3 Ch. App. 488. §216.
- v. Lloyd, 4 D. & W. 369. §20.
- Lock v. Alexander, 2 Hawks, 155; s. c. 11 Am. Dec. 750. §59.
- Lockland v. Smiley, 23 O. St. 94. §49.
- Lockwood v. Slavin, 26 Ind. 135. §§41, 218.
- Lodge v. Simonton, 2 Pen. & Watts. 439. §178.
- Loeb v. Hirsch, 21 Neb. 392. §§246, 254, 256.
- v. Milner, 21 Neb. 702. §265.
- Logan v. Smith, 62 Mo. 455. §204.
- v. Williams, 76 Ill. 175. §23.
- Logwood v. Robertson, 62 Ala. 107. §20.
- Lombard v. Culberson, 59 Wis. 537, §143.
- Long v. Dollarhide, 24 Cal. 218. §159.
- Longworth v. Close, 1 McLean, 282. §131.
- Lookout Bank v. Noe, 86 Tenn. 21. §§189, 193, 218.
- Loomis v. Bush, 36 Mich. 40. §154.
- v. Pingree, 43 Me. 299. §144.
- Looney v. Adamson, 48 Tex. 619. §87.
- Lord v. Falman, 57 Ala. 615. §54.
- Lorton v. Fowler, 18 Neb. 224. §254.
- Loscy v. Simpson, 11 N. J. Eq. (3 Stockt.), 246. §§15, 21, 155, 158, 159, 160, 242.
- Loth v. Carty, 85 Ky. 591. §274.
- Louden v. Blythe, 16 Pa. St. 532; s. c. 55 Am. Dec. 527. §89.
- v. ———, 27 Pa. St. 22; s. c. 67 Am. Dec. 442. §109.
- Loughridge v. Bowland, 52 Miss. 546. §§195, 199, 212, 227, 228.
- Louisiana State Bk. v. Senecal, 13 La. 525. §244.
- Love v. Berry, 22 Tex. 378. §184.
- v. Francis, 63 Mich. 181. §144.
- v. Harbin, 87 N. C. 253. §§69, 122, 128, 130.
- v. Robertson, 7 Tex. 20; s. c. 56 Am. Dec. 41. §182.
- v. Taylor, 26 Miss. 567. §§104, 207.
- Lovejoy v. Raymond, 58 Vt. 509. §181.
- Lovell v. Osgood, 60 N. H. 71. §271.
- Lovett v. German Reformed Church, 12 Barb. 67. §191.
- v. The Steam Saw Mill Co., 6 Paige, 54. §60.
- Loving v. Johnson, 68 Tex. 273. §250.
- Low v. Pettingill, 12 N. H. 337. §256.
- Lowe v. Allen, 68 Ga. 225. §194.
- Lowell v. Wren, 80 Ill. 238. §90.
- Lowells v. Daniels, 2 Gray, 161. §§99, 100, 101.
- Lowery v. Harrison, 2 N. J. L. 51. §260.
- Lowry v. Harris, 12 Minn. 255. §29.
- v. Mayo (Minn.), 43 N. W. Repr. 78. §381.

- Lowther v. Carlton, 2 Atk. 242. §155.
- Loyd v. Lynch, 28 Pa. St. 419; 70 Am. Dec. 137. §204.
- Loyns v. Tedder, 7 S. Car. 69. §273.
- Lucas v. Campbell, 88 Ill. 447. §250.
- v. Clafin, 76 Va. 269. §151.
- v. Cobbs, 1 Dev. & B. 228. §§69, 109.
- Luce v. Moorehead, 73 Iowa, 498. §253.
- Luch's Appeal, 44 Pa. St. 519. §§32, 137, 138.
- Ludden v. Dusenbury, 27 S. Car. 464. §251.
- Ludlow v. Kidd, 3 O. St. 541, 550. §28.
- v. O'Neil, 29 O. St. 181. §§98, 101, 186, 189.
- v. Van Ness, 8 Bosw. 175. §§36, 37.
- Luffborough v. Parker, 12 Serg. & R. 48. §69.
- Lufkin v. Curtis, 13 Mass. 223. §115.
- v. Nunn, 11 Ves. 170. §199.
- Lumber Co. v. Hancock, 70 Tex. 312. §27.
- Lund v. Rice, 9 Minn. 50. §56.
- Lyle v. Ducomb, 5 Binn. 585. §45.
- v. Richards, 19 Serg. & R. 351. §113.
- Lynch v. Livingston, 8 Barb. 463; 6 N. Y. 422. §§62, 65, 68.
- Lyon v. Gleason, 40 Minn. 434. §51.
- v. Kain, 36 Ill. 362. §57.
- v. Logan, 68 Tex. 521. §47.
- v. Ozee, 66 Tex. 95. §47.
- Lyons v. Field, 17 B. Mon. 543. §210.
- v. Leahy, 15 Or. 8. §223.
- M.**
- MacCabe v. Blymyer, 9 Phila. 615. §267.
- Machette v. Wanless, 1 Colo. 225. §253.
- Mackreth v. Symmons, 15 Ves. 336. §§2, 20.
- Macon v. Sheppard, 2 Humph. 335. §§222, 233.
- Magee v. Carpenter, 4 Ala. 469. §210.
- Magness v. Arnold, 31 Ark. 103. §§57, 78.
- Maguiac v. Thompson, 7 Pet. 348. §195.
- Maguire v. DeFremery, 76 Cal. 401. §114.
- Mahoney v. Middleton, 41 Cal. 41. §156.
- Majors v. Cowell, 51 Cal. 478. §43.
- Mallory v. Stodden, 6 Ala. 891. §§132, 154.
- Malloy v. Bruden, 88 N. C. 305. §§61, 104.
- Manaudas v. Mann, 14 Or. 450. §§12, 216.
- Manchester v. Hough, 5 Mason, 67. §111.
- Manly v. Culver, 20 Tex. 143. §§70, 74.
- v. Gibson, 13 Ill. 308. §49.
- v. Slason, 21 Vt. 271. §20.
- Mann v. Martin, 4 Md. 124. §6.
- Mansfield v. Gregory, 8 Neb. 432. §§192, 214.
- Manwaring v. Jemison, 61 Mich. 117. §§257, 258, 260.
- Mara v. Pierce, 9 Gray, 306. §§12, 222, 229.
- Marbury v. Madison, 1 Cranch, 137. §16.
- Marchbanks v. Banks, 44 Ark. 48. 206.
- Marcum v. Coleman, 8 Mont. 196. §254.
- Marier v. Lee, 2 Utah, 460. §2.
- Marigold v. Barlow, 61 Miss. 593; S. C. 48 Am. Rep. 84. §16.
- Mariner v. Saunders, 5 Gilm. 113. §§9, 101.
- Marks v. Cowles, 61 Ala. 299. §191.
- v. Robinson, 82 Ala. 69. §274.
- Marquette v. Jefferey, 49 Mich. 283. §249.
- Marsden v. Cornell, 62 N. Y. 215. §§56, 257, 259.
- Marse v. Beale, 68 Iowa, 463. §54.
- Marsh v. Chambers, 30 Gratt. 299. §§10, 196, 197.
- v. Lee, 2 Vent. 337. §171.
- v. Mitchell, 26 N. J. Eq. 497. §§89, 105.
- v. Wade (Wash.), 20 Pac. Repr. 578. §§247, 253.
- Marston v. Brackett, 9 N. H. 336. §171.
- v. Bradshaw, 18 Mich. 81; S. C. 100 Am. Dec. 152. §85.
- v. Brittenham, 76 Ill. 611. §90.

- Martel v. Somers, 26 Tex. 551, 561.
 §§223, 224, 225.
 Martin v. Brown, 4 Minn. 282. §§27,
 183.
 — v. Camble, 72 Ind. 67. §223.
 — v. Davidson, 3 Bush, 574.
 §§103, 107, 110, 111.
 — v. Dryden, 1 Gilm. 187.
 §§166, 169.
 — v. Dwelly, 6 Wend. 9; s. c.
 21 Am. Dec. 245. §§99, 100.
 — v. Jackson, 27 Pa. St. 509.
 §§51, 181, 209.
 — v. Nash, 31 Miss. 324. §135.
 — v. Neblett, 86 Tenn. 383.
 §178.
 — v. Porker, 26 Tex. 253.
 §96.
 — v. Reed, 30 Ind. 218. §210.
 — v. Roberts, 57 Tex. 564.
 §47.
 — v. Rothschild, 42 Hun, 410.
 §§196, 254, 261.
 — v. Sale, 1 Bail. Eq. 1. §§6,
 132, 154, 216.
 — v. Thompson, 63 Cal. 4.
 §273.
 — v. Williams, 27 Ga. 406. §§14,
 133, 167.
 Martindale v. Price, 14 Ind. 115.
 §28.
 Marvin v. Norton, 48 N. J. L. 412;
 s. c. 57 Am. Rep. 566. §§247,
 249, 250.
 Marx v. Hanthorn, 30 Fed. Repr.
 579. §62.
 Mason v. Black, 87 Mo. 329. §§182,
 224.
 — v. Brock, 12 Ill. 273; s. c.
 52 Am. Dec. 490. §§9, 73, 98,
 101.
 Massey v. Hubbard, 18 Fla. 688.
 §228.
 — v. Wescott, 40 Ill. 160. §§10,
 169, 199.
 Massie v. Greenhow, 2 Pat. & H.
 255. §226.
 Masterson v. West End Ry., 5 Mo.
 App. 64. §§216, 233.
 Mather v. Jenswold, 72 Iowa, 550,
 553. §§169, 175, 180.
 Matlock v. Straughn, 21 Ind. 128.
 §218.
 Matthews v. Puffur, 19 N. H. 348.
 §9.
 — v. Riggs, 80 Mo. 107. §238.
 Mauderschild v. Dubuque, 29 Iowa,
 73. §49.
- Maul v. Rider, 59 Pa. St. 167. §§ 21,
 159, 162, 221, 227.
 Maupin v. Emmons, 47 Mo. 304.
 §182, 222.
 Maury v. Walsh, 8 Cow. 243. §245.
 Maxey v. Wise, 25 Ind. 1. §120.
 Maxwell v. Brooks, 54 Ind. 98. §12.
 — v. Hartman, 50 Wis. 660.
 §§73, 136, 150.
 — v. Wallace, 3 Ired. Eq. 593.
 §148.
 May v. LeClaire, 11 Wall. 217. §§27,
 221.
 — v. Sturdivant, 75 Iowa, 116.
 §235.
 Maybee v. Moore, 50 Mo. 340. §§2,
 217.
 Mayberry v. Morris, 62 Ala. 113.
 §43.
 Mayes v. Bruton, 1 Tex. Civ. App.
 §699. §247.
 Mayfield v. Averitt, 11 Tex. 140.
 §223.
 Mayham v. Coombs, 14 Ohio, 428.
 §§12, 30, 31, 165, 189, 196, 216,
 217.
 Mayo v. Legget, 96 N. C. 237. §228.
 Mays v. Frazee, 4 Litt. 391. §116.
 — v. Hedges, 79 Ind. 288.
 §§89, 157.
 — v. Price, 95 Mo. 603. §121.
 McAdow v. Black, 6 Mont. 601.
 §§59, 177, 183, 199, 207.
 McAfee v. Wheelis, 1 Tex. Un. Cas.
 65. §200.
 McAlpine v. Burnett, 23 Tex. 650.
 §20.
 McAnely v. Chapman, 18 Tex. 198.
 §40.
 McArthur v. Garman, 71 Iowa, 34.
 §273.
 — v. Thomas, 2 Ohio, 415. §21.
 McBeth v. Trabue, 69 Mo. 642.
 §§49, 99, 101.
 McBride v. Wilkinson, 29 Ala. 662.
 §94.
 McCaa v. Wolf, 42 Ala. 389. §99.
 McCabe v. Grey, 20 Cal. 509. §§4,
 163, 178.
 McCaffrey v. Benson, 40 La. 10.
 §114.
 McCagg v. Heacock, 34 Ill. 476.
 §§219, 223.
 McCain v. Wood, 4 Ala. 258. §177.
 McCall v. Powell, 64 Ala. 254.
 §247.
 — v. Rogers, 77 Ala. 349.
 209.

- McCamant v. Patterson, 39 Mo. 110. §§28, 184.
 McCan v. Bradley, 38 La. Ann. 482. §138.
 McCandish v. Keen, 13 Gratt. 621. §20.
 McCandless v. Engle, 51 Pa. St. 309. §104.
 McCarthy v. Grace, 23 Minn. 182. §239.
 — v. Nicrosi, 72 Ala. 332; s. C. 47 Am. Rep. 418. §235.
 McCarty v. Mann, 19 Wall. 20. §161.
 McCleerey v. Wakefield, 76 Iowa, 529. §§230, 232.
 McClurg v. Phillips, 57 Mo. 214. §146.
 McClure v. Roman, 52 Pa. St. 458. §164.
 — v. Tallman, 30 Wis. 515. §184.
 McComb v. McDonald, 82 Va. 903. §249.
 — v. Spangler, 71 Cal. 419, 427. §§114, 117, 182.
 McConnell v. Brown, Lit. Select Cases, 462. §§7, 132.
 — v. Reed, 2 Scam. 371. §52.
 McCord v. Cooper, 30 Ind. 9. §41.
 McCorkle v. Montgomery, 11 Rich. Eq. 132. §§20, 200.
 — v. Amarini, 12 Ala. 17. §128.
 McCormack v. Phillips (Dak.), 34 N. W. Repr. 39. §46.
 — v. Woods, 14 Bush, 78. §101.
 McCormick v. Bauer, 122 Ill. 573. §§173, 174, 209.
 — v. Hadden, 37 Ill. 370. §250.
 — v. Wheeler, 36 Ill. 114. §§241, 243.
 McCoy v. Bailey, 21 Fla. 803. §§57, 76.
 — v. Rhodes, 11 How. 131. §§165, 196.
 — v. Trustees, etc., 5 Serg. & R. 254. §162.
 McCulloch v. Eudlay, 3 Yerg. 346. §§154, 158.
 — v. Myers, 1 Dana, 522. §65.
 McCusker v. McEvey, 9 R. I. 525. §161.
 McDaniel v. Harris, 27 Mo. App. 545. §246.
 — v. Needham, 61 Tex. 269. §§69, 79, 81, 125.
 McDaniels v. Flower Brook, 22 Vt. 274. §59.
 McDannell v. Horrell, 1 Tex. Un. Cas. 521. §§89, 120.
 McDonald v. Bear River Co., 13 Cal. 235. §59.
 — v. Morgan, 27 Tex. 504. §§70, 71, 72.
 — v. Willis, 143 Mass. 452. §46.
 McDowell v. Stewart, 83 Ill. 564. §§254, 269.
 McFadden v. Worthington, 45 Ill. 362. §§166, 169, 199.
 McFarlane v. Griffith, 4 Wash. C. Ct. 585. §203.
 McFarran v. Knox, 5 Cold. 217. §38.
 McGhee v. Gindrat, 20 Ala. 951. §226.
 — v. McKenzie, 43 Ark. 156. §186.
 McGinn v. Tobey, 62 Mich. 252; s. C. 4 Am. St. Rep. 848. §154.
 McGinnis v. Savage, 29 W. Va. 362. §249.
 McGiven v. Wheelock, 7 Barb. 22. §175.
 McGowan v. Reid, 27 S. Car. 262. §§126, 145.
 McGraw v. McGraw, 79 Me. 257. §144.
 — v. Williams, 33 Gratt. 513. §64.
 McGuire v. Barker, 61 Ga. 339. §§13, 133, 166.
 — v. Hay, 6 Humph. 419. §130.
 McHendry v. Reilly, 13 Cal. 75. §20.
 McHenry v. Day, 13 Iowa, 445. §121.
 McIlvain v. Mutual, etc., Co., 93 Pa. St. 30. §164.
 McIlvaine v. Legare, 34 La. Ann. 923. §§20, 178, 180.
 McIlwrath v. Hollender, 73 Mo. 105; s. C. 39 Am. Rep. 487. §43.
 McIntosh v. Beam, 47 Ark. 353. §249.
 McIntyre v. Kamm, 12 Or. 253. §§122, 128.
 — v. Ward, 5 Binn. 301. §§79, 106.
 McKamey v. Thorpe, 61 Tex. 653. §§144, 204, 207.
 McKean v. Mitchell, 35 Pa. St. 269; s. C. 78 Am. Dec. 335. §149.
 McKechnie v. Hoskins, 23 Me. 230. §231.
 McKee v. Mining Co., 8 Colo. 392. §269.

- McKeen v. Delancy, 5 Cr. 22. §§56, 188.
 McKellar v. Peck, 39 Tex. 381. §§73, 186.
 McKiernan v. Fletcher, 2 La. Ann. 458. §213.
 McKinney v. Matthews (Tex.), 6 S. W. Repr. 793. §101.
 McKinnon v. McLean, 2 Dev. & Bat. 79, 85. §§88, 127, 149.
 McKinzie v. Perrill, 15 O. St. 162. §222.
 McKissock v. Colquhoun, 18 Tex. 149. §§125, 129, 187.
 McKnight v. Gordon, 13 Rich. Eq. 222; s. c. 94 Am. Dec. 164. §§133, 193, 194, 199, 212.
 McLanahan v. Reeside, 9 Watts, 508; s. c. 36 Am. Dec. 136. §§31, 181.
 McLane v. Paschal, 47 Tex. 365. §210.
 McLaren v. Thompson, 40 Me. 284. §§255, 256.
 McLaughlin v. Shepherd, 32 Me. 143. §222.
 McLearn v. McLelland, 10 Pet. 625. §20.
 McLeod v. First National Bk., 42 Miss. 99. §208.
 McMechan v. Griffing, 3 Pick. 149; s. c. 15 Am. Dec. 198. §§216, 232.
 McMullen v. Eagan, 21 W. Va. 233. §92.
 McMurtrie v. Riddell, 9 Colo. 497. §§163, 169, 212, 214.
 McNamee v. Huckabee, 20 S. Car. 190. §§131, 133.
 McNeil v. Finnegan, 33 Minn. 375. §269.
 McNutt v. Turner, 16 Wall. 352. §§51, 199, 212.
 McPhaul v. Lapsley, 20 Wall. 264. §96.
 McPhee v. Broderick, 145 Mass. 565. §46.
 — v. Litchfield, 145 Mass. 565; 1 Am. St. Rep. 482. §46.
 McPherson v. Rollins, 107 N. Y. 317; s. c. 1 Am. St. Rep. 826. §§4, 34, 152, 176, 178.
 McQuiddy v. Ware, 67 Mo. 74. §235.
 McRae v. Merrifield, 48 Ark. 100. §249.
 McRaven v. McGuire, 1 S. & M. (17 Miss.), 34. §§62, 132.
 McShirley v. Burt, 44 Ind. 332. §155.
 McTaggart v. Rose, 14 Ind. 230. §254.
 McVay v. English, 30 Kan. 368. §254.
 Meacham v. Steele, 93 Ill. 135. §164.
 Mead v. N. Y., etc., Ry. Co., 45 Conn. 199. §198.
 Mechanic's Bk. v. Seton, 1 Pet. 299. §244.
 Meddock v. Williams, 12 Ohio, 377. §69.
 Meech v. Patchin, 14 N. Y. 71. §§257, 258.
 Meehan v. Williams, 48 Pa. St. 238. §237.
 Meier v. Blume, 80 Mo. 179. §§221, 223, 238.
 Meighen v. Strong, 6 Minn. 177. §171.
 Meherin v. Oaks, 67 Cal. 57. §254.
 Meni v. Rathbone, 21 Ind. 454. §§7, 132.
 Menzies v. Dodd, 19 Wis. 443. §259.
 Merchant's Bank v. Harrison, 39 Mo. 433; s. c. 93 Am. Dec. 285. §§66, 71, 72.
 Merkerman v. Day, 35 Kan. 46. §8.
 Merriam v. Boston R. R., 117 Mass. 241. §99.
 Merrick v. Avery, 14 Ark. 370. §275.
 — v. Wallace, 19 Ill. 486. §§16, 69, 143, 147, 179.
 Merrill v. Montgomery, 25 Mich. 73. §60.
 — v. Ressler, 37 Minn. 82; 5 Am. St. Rep. 822. §§252, 253.
 — v. Sandford, 49 Me. 566. §254.
 Merrills v. Swift, 18 Conn. 257. §144.
 Merriman v. Bartlett, 34 Minn. 524. §§46, 47.
 Merritt v. Harris, 102 Mass. 326. §161.
 — v. Home, 5 O. St. 307. §146.
 — v. The Northern R. R. Co., 12 Barb. 605. §202.
 — v. Yates, 71 Ill. 636; s. c. 22 Am. Rep. 128. §§5, 88, 92, 111, 112.
 Meskimen v. Day, 35 Kan. 46. §73.
 Messerschmidt v. Baker, 22 Minn. 81. §48.
 Messick v. Sunderland, 6 Cal. 297. §37.

- Metcalfe v. Brandon, 60 Miss. 685. §144.
 Metropolitan Bk. v. Godfrey, 23 Ill. 579. §§207, 231, 236.
 Metts v. Bright, 4 Dev. & Bat. 173; s. C. 32 Am. Dec. 683. §140.
 Metz v. State Bank, 7 Neb. 165. §42.
 Meuley v. Zeigler, 23 Tex. 88. §240.
 Meyer v. Fegaly, 39 Pa. St. 429. §42.
 — v. Gossett, 38 Ark. 377. §89.
 — v. Kinzer, 12 Cal. 252, §182.
 Meyers v. Buchanan, 46 Miss. 397. §187.
 Michener v. Cavender, 38 Pa. St. 334; s. C. 80 Am. Dec. 486. §§88, 89, 90.
 Michigan Cent. Ry. v. Dolan, 32 Mich. 570. §244.
 Michigan Ry. v. Phillips, 60 Ill. 190. §250.
 Mickel v. Gardner, 41 Ark. 491. §109.
 Middlebury College v. Cheney, 1 Vt. 336. §63.
 Miles v. King, 5 S. Car. 146. §§199, 212.
 — v. Langley, 1 Russ. & My. 39. §237.
 Milbolland v. Tiffany, 64 Md. 455. §30.
 Millaudan v. Allord, 2 La. Ann. 551. §144.
 Millard v. McMullen, 68 N. Y. 345. §235.
 Miller v. Alexander, 8 Tex. 45. §37.
 — v. Bingham, 29 Vt. 82. §§171, 226.
 — v. Bradford, 12 Iowa, 14. §17.
 — v. Estill, 8 Yerg. 452. §42.
 — v. Fish, 1 Ariz. 232, 243. §100.
 — v. Henshaw, 4 Dana, 325. §73.
 — v. Jones, 15 Nat. Bank Reg. 150. §260.
 — v. Koertge, 70 Tex. 162. §143.
 — v. Platt, 5 Duer, 272. §233.
 — v. Powell, 53 Mo. 252. §91.
 — v. Shackelford, 3 Dana, 299. §101.
 — v. Shotwell, 38 La. Ann. 890. §24.
 Miller v. Tharel, 75 N. C. 148. §189.
 — v. Ware, 31 Iowa, 524. §17.
 — v. Wentworth, 82 Pa. St. 280. §§87, 121.
 — v. Yturria, 69 Tex. 549. §14.
 Millhizer v. Erdwin, 98 N. C. 282; s. C. 2 Am. St. Rep. 334. §433.
 Milligan v. Dickson, Pet. C. Ct. 433, 438. §188.
 — v. Mayne, 2 Cr. C. Ct. 210. §75.
 Mills v. Penny, 74 Iowa, 172; s. C. 7 Am. St. Rep. 172. §343.
 — v. Smith, 8 Wall. 27. §155.
 — v. —, 4 Biss. 412. §§159, 180.
 Milner v. Turner's Heirs, 4 Mon. 240. §101.
 Miltenberger v. Drebroca, 33 La. Ann. 313. §173.
 Milton v. Turner, 38 Tex. 31. §§134, 187.
 Mims v. Mims, 35 Ala. 23. §16.
 Miner's Ditch Co. v. Zellerbach, 37 Cal. 543. §60.
 Minis v. Minis, 35 Ala. 23. §31.
 Minton v. Pickens, 24 S. Car. 592. §210.
 Miss. Valley Co. v. Ry. Co., 58 Miss. 854. §§19, 20, 195.
 Mitchell v. Aten, 37 Kan. 33; s. C. 1 Am. St. Rep. 231. §155.
 — v. Churchman, 4 Humph. 218. §234.
 Mitford v. Mitford, 9 Ves. 87. §213.
 Mixer v. Bennett, 70 Iowa, 329. §56.
 Mobile Co. v. Randall, 71 Ala. 220. §207.
 Mobile Bank v. Tishamingo, 62 Miss. 250. §§31, 137, 138.
 Moffatt v. Hardin, 22 S. Car. 9. §33.
 Moline Plow Co. v. Braden, 71 Iowa, 141. §250.
 Monaghan v. Longfellow, 81 Me. 298. §255.
 Money v. Dorsey, 7 Sm. & M. 15. §§192, 197.
 Monks v. Jenkins, 2 Hill. Ch. 9. §128.
 Monroe v. Arledge, 23 Tex. 478. §§52, 81.
 — v. Hamilton, 60 Ala. 227. §177.
 Montana Imp. Co. v. Coulter, 7 Mont. 541. §185.
 Montgomery v. Kopperl, 75 Cal. 128. §219.

- Montgomery v. Noyes (Tex.), 11 S. W. Repr. 13s. §§114, 182.
 — v. Wight, 8 Mich. 143. §§253, 262, 269.
 Moody v. Black, 117 Mass. 23; s. c. 19 Am. Rep. 394. §§154, 245.
 — v. Butler, 63 Tex. 210. §235.
 — v. Dryden, 72 Iowa, 461. §144.
 Moore v. Bennett, 2 Ch. Cas. 246. §182.
 — v. Curry, 36 Tex. 668. §155.
 — v. Fuller, 6 Or. 272. §§89, 121.
 — v. Hill, 59 Ga. 760. §75.
 — v. Holcombe, 3 Leigh, 397. §20.
 — v. Jones, 63 Cal. 12. §182.
 — v. Lehman, 30 Kan. 514. §253.
 — v. Moore, 3 O. St. 154. §65.
 — v. Nelson, 3 McLean, 383. §11.
 — v. Pierson, 6 Iowa, 279; s. c. 71 Am. Dec. 409. §228.
 — v. Simonds, 100 U. S. 145. §275.
 — v. Thomas, 1 Or. 201. §§3, 14, 31, 165, 216.
 — v. Thompson, 69 N. C. 121. §237.
 — v. Vance, 1 Ohio, 1. §65.
 — v. Walker, 3 Lea, 656. §209.
 — v. Young, 4 Biss. 128. §§213, 218, 269.
 Mooring v. Campbell, 47 Tex. 37. §234.
 Moorman v. Board, 11 Bush, 185. §§106, 108.
 — v. Gibbs, 75 Iowa, 537. §192.
 Moran v. Palmer, 13 Mich. 367. §25.
 Morecock v. Dickens, Amb. 678. §§2, 36.
 Moreland v. Laurence, 23 Minn. 84. §145.
 — v. Richardson, 24 Beav. 33. §§228, 234.
 Morgan v. Chicago, 96 U. S. 716. §49.
 — v. Curtenius, 4 McLean, 366. §76.
 — v. Elam, 4 Yerg. 375. §195.
 — v. Shinn, 15 Wall. 105. §276.
 — v. Snell, 3 Baxt. 382. §38.
 — v. Way, 16 Ohio, 469. §24.
 Moring v. Dickerson, 85 N. C. 466. §172.
 Morrill v. Morrill, 60 Vt. 74. §§12, 127, 145.
 — v. Sanford, 49 Me. 566. §§41, 264.
 Morris v. Cain, 39 La. Ann. 712. §170.
 — v. Daniels, 35 O. St. 405. §216.
 — v. Harris, 9 Gill, 19. §100.
 — v. Murray, 82 Ky. 36. §171.
 — v. Sargent, 18 Iowa, 199. §§9, 98, 101.
 — v. White, 36 N. J. Eq. 324. §§12, 216.
 — v. Word, 36 N. Y. 587. §204.
 Morrison v. Brown, 83 Ill. 564. §§53, 154, 172.
 — v. Clark, 55 Tex. 437. §114.
 — v. Funk, 23 Pa. St. 421. §§199, 212.
 — v. Kelley, 22 Ill. 610; s. c. 74 Am. Dec. 169. §§153, 156, 181, 219, 221.
 — v. March, 4 Minn. 422. §§223, 236.
 — v. Phillips, 35 Minn. 192. §46.
 — v. Porter, 35 Minn. 425. §56.
 — v. White, 16 La. Ann. 100. §66.
 Morrow v. Graves, 77 Cal. 218. §294.
 — v. Reed, 30 Wis. 81. §§41, 242, 254.
 — v. State, 22 Tex. Ct. App. 239. §56.
 Morse v. Clayton, 21 Miss. 373. §78.
 — v. Curtis, 140 Mass. 112; s. c. 54 Am. Rep. 456. §157.
 — v. Godfrey, 3 Story, 364. §217.
 — v. Hunter, 1 Gilm. 317. §§177, 180.
 — v. Jones, 63 Cal. 12. §114.
 — v. Wright, 60 Cal. 260. §204.
 Morton v. Lowell, 56 Tex. 643. §205.
 — v. Robards, 4 Dana, 258. §§10, 19, 36, 38, 192.
 — v. Smith, 2 Dill. 316. §75.
 Moseley v. Shattuck, 43 Iowa, 540. §251.
 Mosely v. Hawkinson, 23 S. Car. 519. §115.
 Moshier v. Meek, 80 Ill. 79. §20.
 Moss v. Atkinson, 44 Cal. 3. §228.

- Mott v. Clark, 9 Pa. St. 399; s. c. 49 Am. Dec. 566. §§155, 174, 203.
 — v. Smith, 16 Cal. 533. §63.
 Mount v. Kesterson, 6 Coldw. 452. §§29, 77, 108.
 Mountford v. Scott, Turn. & R. 274. §241.
 — v. —, 3 Madd. 40. §241.
 Mowbray v. Cady, 40 Iowa, 604. §251.
 Mowrey v. Walsh, 8 Cow. 238. §248.
 Moyer v. McCullough, 1 Ind. 211. §135.
 Mueller v. Engein, 12 Bush, 441. §180.
 Muir v. Blake, 57 Iowa, 662. §§253, 273.
 — v. Gallaway, 61 Cal. 498. §§79, 98, 112.
 — v. Jolly, 26 Beav. 143. §230.
 Mullen v. His Creditors, 39 La. Ann. 397. §41.
 Muller v. Boggs, 25 Cal. 175. §62.
 — v. Boone, 63 Tex. 91. §60.
 Mulliken v. Graham, 72 Pa. St. 484. §224.
 Mullins v. Weaver, 61 Tex. 5. §§76, 81.
 Mullis v. Cavins, 5 Blackf. 77. §56.
 Mullison's Estate, 68 Pa. St. 212. §227.
 Mumford v. Cante, 50 Ill. 370. §266.
 — v. Wardwell, 6 Wall. 423. §136.
 Muncie v. Brown, 112 Ind. 474. §73.
 Munde v. Freeman (Fla.), 3 South. Repr. 153. §67.
 Mundin v. Berwin, 62 Tex. 341. §47.
 Muudy v. Vawter, 3 Gratt. 518. §147.
 Munn v. McDonald, 10 Watts, 270. §§202, 208.
 Munroe v. Eastman, 31 Mich. 283. §227.
 Munson v. Ensor, 94 Mo. 504. §§149, 183.
 — v. Fraser, 73 Iowa, 177. §343.
 Murch v. Wright, 46 Ill. 487; s. c. 95 Am. Dec. 455. §250.
 Murphy v. Hendricks, 57 Ind. 593. §147.
 — v. Welder, 58 Tex. 235. §233.
 Murray v. Charleston, 96 U. S. 432. §268.
 Murray v. Lylburn, 2 Johns. Ch. 443. §33.
 Murrell v. Watson, 1 Tenn. Ch. 342. §222.
 Muse v. Latterman, 13 Serg. & R. 167. §14.
 Musgrove v. Bosner, 5 Or. 313; s. c. 20 Am. Rep. 737. §§75, 81, 82, 92, 142, 159, 219, 221.
 Mut. Ass'n Society v. Stone, 3 Leigh, 218. §203.
 Mut. Ins. Co. v. Rowand, 26 N. J. Eq. 389. §§19J.
 Mutual Life Ins. Co. v. Dake, 1 Abb. N. C. 381. §142.
 — v. Wilcox, 55 How. Pr. (N. Y.), 43. §34.
 Mut. Loan Co. v. Elwell, 38 N. J. Eq. 18. §170.
 Myers v. Boyd, 96 Pa. St. 427. §71.
 — v. Ross, 3 Head, 60. §§216, 238, 241.
 Myrick v. McMillan, 13 Wis. 188. 191. §128.
- N.
- Nail v. Temple, 12 Iowa, 276. §§45, 46.
 Nailer v. Young, 7 Lea, 737. §211.
 Nauty v. Bailey, 3 Dana, 111. §104.
 Nash v. Norment, 5 Mo. App. 545. §§253, 254.
 Nathans v. Arkwright, 66 Ga. 179. §204.
 National Bank v. Conway, 14 Nat. Bank Reg. 513; s. c. 1 Hughes, 37. §§3. 67, 213.
 — v. Morse, 73 Iowa, 174; s. c. 5 Am. St. Rep. 670. §144.
 — v. Sprague, 21 N. J. Eq. 530. §§257, 258, 259.
 — v. Whitney, 103 U. S. 99. §§14, 31.
 National Bank of Fredericksburg, v. Conway, 1 Hughes (Cir. Ct.), 37. §18.
 National Security Bk. v. Cushman, 121 Mass. 490. §§239, 244.
 National State Bank v. Morse, 71 Iowa, 174. §256.
 Nazro v. Ware, 38 Minn. 443. §144.
 Neal v. Perkerson, 61 Ga. 345. §235.
 Nebe, *In re.*, 11 Nat. Bank Reg. 289. §73.
 Neeley v. Searight, 113 Ind. 316. §§45, 46.

- Neide v. Pennypacker, 9 Phila. 86. §§174, 209.
 Neidig v. Whiteford, 29 Md. 178. §175.
 Neil v. Kinney, 10 O. St. 67. §20.
 Neilson v. Iowa East Ry. Co., 44 Iowa, 71. §45.
 Nellis v. Munson, 24 Hun, 575. §48.
 — v. —, 108 N. Y. 453. §§54, 165, 196, 218.
 Nelson v. Boyce, 7 J. J. Marsh, 401. §38.
 — v. Dunn, 15 Ala. 501. §12.
 — v. Graff, 44 Mich. 433. §83.
 — v. Hagerstown Bank, 27 Md. 51. §271.
 — v. Neil, 15 Hun, 383. §263.
 — v. Nelson, 117 Pa. St. 278. §228.
 — v. Wade, 21 Iowa, 49. §147.
 Nesbit v. Worts, 37 O. St. 382. §271.
 Neslin v. Wells, 14 Otto (104 U. S.), 428. §§6, 14.
 New v. Wheaton, 24 Minn. 406. §231.
 Newberry v. Bulkley, 5 Day, 384. §32.
 Newburg Car Co. v. Union, etc., Co., 4 Blatchf. 1. §244.
 Newell v. Anderson, 7 O. St. 12. §119.
 — v. Warner, 44 Barb. 258. §§257, 258, 260.
 Newhall v. Burt, 7 Pick. 157. §§16, 154.
 — v. Pierce, 22 Mass. (5 Pick.), 451. §230.
 Newkirk v. Dalton, 27 Ill. 413. §248.
 Newman v. Davis, 24 Fed. Repr. 609. §212.
 — v. Samuels, 17 Iowa, 528. §§8, 97, 210.
 — v. Tymeson, 13 Wjs. 172: s. c. 80 Am. Dec. 735. §§147, 149, 171.
 New Orleans v. Labrousche, 31 La. Ann. 839. §229.
 — v. U. S., 10 Pet. 498. §49.
 New Orleans, etc., Co. v. Montgomery, 5 Otto (95 U. S.), 18. §35.
 Newsom v. Kurtz, 86 Ky. 277. §352.
 Newton v. McLain, 41 Barb. 285. §154.
 New York Co. v. White, 17 N. Y. 469. §§136, 140.
 N. Y. Ins. Co. v. Nat. Prot. Ins. Co., 20 Barb. 468. §244.
 N. Y. Life Co. v. Smith, 2 Barb. Ch. 82. §§33, 204.
 N. Y. Life Ins. Co. v. Covert, 6 Abb. N. S. 154. §§153, 177.
 — v. Cutler, 3 Sandf. Ch. 176. §§230, 237.
 — v. Staats, 21 Barb. 570. §145.
 N. Y. Ry. Co. v. Schuyler, 34 N. Y. 30. §247.
 Nichol v. Henry, 89 Ind. 54. §142.
 Nichols v. Hampton, 46 Ga. 253. §§67, 73, 132, 254.
 — v. Moore, 25 Hun, 640. §266.
 — v. Stewart, 15 Tex. 225. §74.
 Nicholson v. Golden, 27 Mo. App. 132. §247.
 Nicklin v. Betts, 11 Or. 406; s. c. 50 Am. Rep. 477. §§137, 170, 255.
 Nicols v. Ruggles, 76 Me. 25. §281.
 Nippel v. Hammond, 4 Colo. 211. §§76, 105, 107.
 Nitchie v. Townshend, 2 Sandf. 299. §259.
 Nolan v. Grant, 53 Iowa, 392. §97.
 Nolen v. Gwyn, 16 Ala. 725. §204.
 Noll v. Swineford, 6 Pa. St. 187. §45.
 Norman v. Wells, 17 Wend. 137. §128.
 Norris' Appeal, 30 Pa. St. 122. §45.
 Norris v. Hix, 74 Iowa, 524. §273.
 North v. Belden, 13 Conn. 376. §139.
 — v. Henneberry, 44 Wis. 306. §59.
 North Brit. Ins. Co. v. Hallett, 7 Jur. N. S. 1263. §218.
 North West Forwarding Co. v. Mahaffey, 36 Kan. 152. §§168, 192.
 Northrop v. Wright, 7 Hill, 476. §§77, 91.
 Northrup v. Bremer, 8 Ohio, 392. §§13, 133, 166, 167.
 Norton v. Meader, 4 Sawy. 603, 625. §§57, 104, 105.
 — v. Shelby County, 118 U. S. 425. §64.
 — v. Williams, 9 Iowa, 528. §§10, 192.
 Noyes v. Hall, 97 U. S. 34. §§198, 228.
 — v. Horr, 13 Iowa, 570. §143.
 Nugent v. Priebeastch, 61 Miss. 402. §§10, 196, 198, 199, 212.

Nute v. Nute, 41 N. H. 60. §§132, 222.
 Nye v. Moody, 70 Tex. 434. §§147, 149.

O.

Oakland v. Murphy, 9 Pac. Repr. 483. §77.
 Oakly v. Ballard, Hemp. (U. S. C. Ct.), 475. §202.
 Oatman v. Fowler, 43 Vt. 462. §56.
 Oconto v. Jerrard, 46 Wis. 317. §§142, 143.
 Odd Fellows v. Masser, 24 Pa. St. 507; s. c. 64 Am. Dec. 675. §46.
 Odd Fellows Bk. v. Banton, 46 Cal. 603. §167.
 Odiorne v. Mason, 9 N. H. 30. §§65, 68.
 Odum v. Loomis, 1 Tex. Civ. App. §524. §45.
 O'Farrall v. Simplot, 4 Iowa, 381. §§92, 107, 121.
 Ogden v. Walters, 12 Kan. 282. §§76, 82, 152, 178.
 Ogle v. Ogle, 41 O. St. 359. §118.
 — v. Turpin, 102 Ill. 148. §175.
 Oglesby v. Hollister, 76 Cal. 136. §294.
 Oglesby Coal Co. v. Pasco, 79 Ill. 164. §§99, 101.
 Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866. §§4, 199.
 O'Keefe v. Handy, 31 La. Ann. 832. §87, 119.
 Old Dominion Granite Co. v. Clarke, 28 Gratt. 617. §42.
 Oliver v. Platt, 3 How. (44 U. S.), 333. §§155, 210, 223.
 — v. Sanborn, 60 Mich. 346. §224.
 Olivier v. Townes, 2 Mart. (N. S.), 93. §267.
 Olson v. Heath, 37 Minn. 298. §45.
 O'Neill v. Douthitt, 40 Kan. 689; s. c. 39 Kan. 316. §175.
 — v. Seixas, 85 Ala. 80. §19.
 — v. Wabash, 4 Biss. 482. §163.
 Oney v. Clendenin, 28 W. Va. 34. §70.
 Orcutt v. Moore, 134 Mass. 48. §254.
 Oregon Trust Co. v. Shaw, 5 Saw. 336. §§33, 174, 209.
 Ormsby v. Budd, 72 Iowa, 80. §89.
 — v. Nolan, 69 Iowa, 130. §253.
 O'Rourke v. O'Connor, 39 Cal. 412. §198.

Orr v. Lacy, 4 McLean, 243. §§61, 73.
 — v. O'Brien, 55 Tex. 149. §50.
 Orth v. Jennings, 8 Blackf. 420. §§10, 192, 199, 212.
 Orvis v. Newell, 17 Conn. 97. §§152, 176.
 Osborn v. Carr, 12 Conn. 195, 198. §205.
 — v. Osborn, 62 Tex. 495. §182.
 Osborne v. Tunis, 1 Dutch. 633. §60.
 Oster v. Robeneau, 46 Mo. 595. §47.
 Oswald v. Grenet, 22 Tex. 94. §49.
 Otis v. Payne, 86 Tenn. 663. §§205, 216.
 — v. Sill, 8 Barb. 102. §§257, 258.
 Owen v. Norris, 5 Blackf. 479. §79.
 Owens v. Miller, 29 Md. 144. §12.
 — v. Roberts, 36 Wis. 258. §238.

P.

Pacific Co. v. Anglin, 82 Ala. 492. §121.
 Padgett v. Lawrence, 10 Paige, 170; s. c. 40 Am. Dec. 272. §§207, 208.
 Page v. Arnim, 29 Tex. 53. §§78, 128.
 — v. Ordway, 40 N. H. 253. §§253, 271.
 — v. Waring, 76 N. Y. 463. §21.
 Paige v. Chapman, 58 N. H. 333. §204.
 — v. Lindsey, 69 Iowa, 593. §143.
 Paine v. Baker, 15 R. I. 100. §107.
 — v. Benton, 32 Wis. 491. §253.
 — v. French, 4 Ohio, 318. §§171, 226.
 — v. Hall's Safe Co., 64 Miss. 175. §§249, 251.
 — v. Mason, 7 O. St. 198. §§12, 28, 252, 257, 258, 269.
 — v. Mooreland, 15 Ohio, 435; s. c. 45 Am. Dec. 585, §§199, 212.
 Palmer v. Bates, 22 Minn. 532. §§34, 232.
 — v. Howard, 72 Cal. 293. §§245, 250.
 — v. Palmer, 9 Gray (75 Mass.), 56. §58.
 — v. —, 48 Vt. 69. §171.
 — v. Stevens, 11 Cush. 147. §62.

- Palmer v. Williams, 24 Mich. 328. §§204, 205.
- Pancake v. Cauffman, 114 Pa. St. 113. §§32, 154.
- Papot v. S. W. Ry. Co., 74 Ga. 296. §§50, 134, 238.
- Pardun v. Dobesberger, 3 Ind. 389. §105.
- Paris v. Lewis, 85 Ill. 597. §§154, 181.
- Parish Board v. Edrington, 40 La. Ann. 633. §§96, 187.
- Parke v. Neeley, 90 Pa. St. 52. §181.
- Parker v. Baines, 65 Tex. 605. §§233, 234.
- v. Baxter, 86 N. Y. 586. §250.
- v. Chance, 11 Tex. 518. §114.
- v. Conner, 93 N. Y. 118; s. c. 45 Am. Rep. 184. §§176, 178, 245.
- v. Coop, 60 Tex. 111. §§19, 114, 200.
- v. Hall, 2 Head. 641. §§40, 245.
- v. Hill, 8 Metc. (49 Mass.), 447. §144.
- v. Jacoby, 3 Grant's Cas. 300. §164.
- v. Kane, 4 Wis. 1; s. c. 65 Am. Dec. 283. §§180, 182, 221, 225, 239.
- v. Middlebrook, 24 Conn. 207. §40.
- v. Morrison, 46 N. H. 280. §271.
- v. Osgood, 3 Allen (85 Mass.), 487. §§221, 222.
- v. Phillips, 9 Cow. 94. §§129, 140.
- v. Spencer, 61 Tex. 155. §163.
- v. Washoe Mfg. Co., 49 N. J. L. 465. §146.
- Parkhurst v. Hosford, 21 Fed. Repr. 827. §224.
- Parkist v. Alexander, 1 Johns. Ch., 394. §§3, 4, 6, 152.
- Parmelee v. Simpson, 5 Wall. 81. §§144, 163.
- Parmenter v. Oakley, 69 Iowa, 388. §33.
- Parmentier v. Gillespie, 9 Barr, 86. §164.
- Parrett v. Shaubhut, 5 Minn. 323; s. c. 80 Am. Dec. 424. §§17, 145.
- Parry v. Kelly, 52 Cal. 334. §114.
- Parsons v. Boyd, 20 Ala. 112. §§80, 129, 150.
- v. Lent, 34 N. J. Eq., 67. §136.
- Partridge v. Chapman, 81 Ill. 137. §205.
- v. Smith, 2 Biss. 183. §§147, 179, 207.
- Patrick v. Howard, 47 Mich. 40. §144.
- Patten v. Ins. Co., 40 N. H. 375. §241.
- v. Moore, 32 N. H. 382. §§204, 205, 232.
- Patterson v. Collier, 75 Ga. 419. §95.
- v. De La Ronde, 8 Wall. 292. §§165, 173, 217.
- v. Gillies, 64 Barb. 563. §260.
- v. Lawrence, 90 Ill. 174. §118.
- Patton v. Brown, 1 Cooke, 119. §71.
- v. King, 26 Tex. 685; s. c. 84 Am. Dec. 596. §117.
- v. McDonald, 43 Mo. 93. §192.
- Patty v. Pease, 8 Paige, 277; s. c. 35 Am. Dec. 683. §21.
- Paul v. Carpenter, 70 N. C. 502. §61.
- v. Fulton, 25 Mo. 156. §206.
- Paulk v. King, 86 Ala. 332. §§192, 277.
- Payne v. Bensley, 8 Cal. 260; s. c. 68 Am. Dec. 318. §204.
- v. McKinney, 30 Ga. 83. §56.
- v. Pavey, 29 La. Ann. 116, 117. §§4, 12, 16, 165, 173, 217.
- v. Treadwell, 16 Cal. 238. §120.
- Peabody v. Fenton, 3 Barb. Ch. 451. §179.
- Peak v. Brinson, 71 Tex. 310. §117.
- Pearce v. Foreman, 29 Ark. 563. §20.
- v. Jackson, 61 Tex. 642. §§114, 204.
- Pearson v. Boyd, 62 Tex. 541. §234.
- v. Powell, 100 N. C. 86. §§148, 154.
- Pease v. Barbiers, 10 Cal. 436. §105.
- v. Kelly, 3 Or. 417. §20.
- v. Odenkirchen, 42 Conn. 415. §265.
- Peasley v. McFadden, 68 Cal. 611. §§221, 228, 236.

- Peay v. Pickett, 3 McCord (S. Car.), 318. §56.
 Peck v. Conway, 119 Mass. 546. §138.
 — v. Mallams, 10 N. Y. 509. §17.
 — v. McKellar, 33 Tex. 234. §74.
 — v. Vandenburg, 30 Cal. 11. §182.
 Peckham v. Haddock, 36 Ill. 38. §175.
 — v. Hendren, 76 Ind. 47. §§243, 244.
 Peet v. Commerce Ry. Co., 70 Tex. 522. §114.
 — v. Spencer, 90 Mo. 384. §§211, 247, 250, 251.
 Pegram v. Owens, 64 Tex. 475. §§40, 48, 94, 245.
 Pell v. McElroy, 36 Cal. 268. §231.
 Penfield v. Dunbar, 64 Barb. 239. §205.
 Penning v. Jones, 57 Iowa, 37. §274.
 Penn. Salt Co. v. Neel, 54 Pa. St. 19. §174.
 People v. Bristol, 35 Mich. 28. §§41, 151.
 — v. Butler (Mich.), 42 N. W. Repr. 243. §148.
 — v. Clark, 7 N. Y. 385. §174.
 — v. Hamilton, 17 Ill. App. 599. §269.
 — v. Register of N. Y., 6 Abb. 180. §§63, 66, 71.
 — v. Snyder, 41 N. Y. 397. §§66, 69, 87, 144.
 — v. Spicer, 99 N. Y. 225. §§174, 190.
 People's Saving Bank v. Bates, 120 U. S. 556. §207.
 Peppard v. House, 37 Minn. 280. §242.
 Pepper v. George, 51 Ala. 190. §209.
 — v. O'Dowd, 39 Wis. 538. §234.
 Pepper's Appeal, 77 Pa. St. 373. §§33, 40, 174, 209.
 Pereau v. Frederick, 17 Neb. 117. §89.
 Perkins v. Emerson, 59 Me. 319. §§275, 276.
 — v. Sterne, 23 Tex. 561; s. c. 76 Am. Dec. 72. §§204, 205.
 — v. Strong, 22 Neb. 725. §§16, 151.
 Perrin v. Reed, 35 Vt. 2. §134.
 Perry v. Perry, 99 N. C. 270. §102.
 — v. Priebatsch, 61 Miss. 402. §200.
 Peters v. Clements, 46 Tex. 115. §55.
 — v. Ham, 62 Iowa, 656. §143.
 — v. Parsons, 18 Neb. 191. §253.
 Peterson v. Kaigler, 78 Ga. 245. §§246, 267.
 — v. Kilgore, 58 Tex. 88. §144.
 — v. Lowry, 48 Tex. 408. §§48, 55, 65.
 — v. McCullough, 50 Ind. 35. §235.
 Peto v. Hammond, 29 Beav. 91. §§163, 165.
 Petrie v. Woodworth, 3 Cal. 219. §42.
 Petry v. Ambroscher, 100 Ind. 510. §§12, 216.
 Peychand v. Citizens' Bank, 21 La. Ann. 262. §4.
 Peyton v. Barton, 53 Tex. 298. §234.
 Pfeaff v. Jones, 50 Md. 263. §194.
 Phelan v. Brady, 19 Abb. N. Cas. 289. §233.
 Phelps v. Barnhart, 88 N. C. 333. §§7, 54, 132, 189, 216, 217.
 — v. Fockler, 61 Iowa, 340. §172.
 — v. Hubbard, 51 Vt. 489. §251.
 — v. Morrison, 24 N. J. Eq. 195. §205.
 Phifer v. Barnhart, 88 N. C. 333. §§7, 54, 132, 189, 216, 217.
 Philbrook v. Delano, 29 Me. 414. §§4, 20, 203.
 Phillips v. Bank, 18 Pa. St. 394. §209.
 — v. Clarke, 4 Met. 348; s. c. 83 Am. Dec. 471. §151.
 — v. Green, 3 A. K. Marsh. 7; s. c. 13 Am. Dec. 124. §105.
 — v. Johnson, 64 N. H. 393. §271.
 — v. People, 11 Ill. App. 340. §75.
 — v. Porter, 3 Ark. 18; s. c. 36 Am. Dec. 448. §181.
 — v. Ruble, Litt. Sel. Cas. 221. §78.
 — v. South Park Bk., 119 Ill. 626. §177.
 Philly v. Sanders, 11 O. St. 490. §22.

- Piatt v. St. Clair, 7 Ohio. 165. §184.
 ——— v. Vattier, 1 McLean, 146.
 §225.
 Pickens v. Knisely, 29 W. Va. 1; s.
 c. 6 Am. St. Rep. 622. §§9, 80,
 90, 98, 111, 121, 186.
 Pickering v. Busk, 15 East. 44. §27.
 Pickett v. Banks, 11 Sm. & M. 446.
 §§196, 198.
 ——— v. Barron, 29 Barb. 505.
 §204.
 ——— v. Jones, 63 Mo. 195, 199.
 §210.
 Pico v. Gallardo, 52 Cal. 206. §32.
 Pierce v. Faunce, 47 Me. 547. §209.
 ——— v. Fort, 60 Tex. 464. §89.
 ——— v. Hokes, 11 Harris, 231.
 §70.
 ——— v. Indseth, 16 Otto. (106 U.
 S.), 546. §73.
 ——— v. Taylor, 23 Me. 246. §160.
 ——— v. Turner, 5 Cranch. 154.
 §195.
 Pierson v. Manning, 2 Mich. 464.
 §211.
 Piester v. Piester, 22 S. Car. 139.
 §§133, 135, 194.
 Pike v. Colvin, 67 Ill. 227. §246.
 ——— v. Gavin, 29 Me. 183. §22.
 ——— v. Goodnow, 12 Allen, 472.
 §180.
 Pilcher v. Smith, 2 Head. 209. §117.
 Pillow v. Roberts, 13 How. (U. S.),
 472. §73.
 ——— v. Shannon, 3 Yerg. 508.
 §205.
 Pinckney v. Burrage, 31 N. J. L.
 21. §76.
 Piper v. May, 51 Ind. 283. §118.
 Pique v. Arendale, 71 Ala. 91.
 §228.
 Pitman v. Sofley, 64 Ill. 135. §225.
 Pixley v. Huggins, 15 Cal. 127.
 §§114, 192, 212.
 Plano Co. v. Griffith, 75 Iowa, 102.
 §253.
 Plant v. Shryock, 62 Miss. 821.
 §153, 177.
 ——— v. Smythe, 45 Cal. 161. §25.
 Platt v. Preston, 3 Fed. Repr. 394.
 §254.
 ——— v. Squire, 12 Met. (53 Mass.),
 494. §§171, 226.
 ——— v. Stewart, 13 Blatchf. 481.
 §260, 261.
 Plumb v. Fluitt, 2 Anstr. 432. §221.
 Plumer v. Robertson, 6 Serg. & R.
 179. §232.
 Poage v. Wabash, 24 Mo. App. 199.
 §§178, 181, 221.
 Point Pleasant v. Cranmer, 40 N.
 J. Eq. 81. §49.
 Polk v. Chaison, 72 Tex. 500. §471.
 ——— v. Cosgrove, 4 Biss. 437.
 §§180, 239.
 ——— v. Gallant, 2 Dev. & Bat. Eq.
 395; s. c. 34 Am. Dec. 395. §212.
 ——— v. Reynolds, 31 Md. 106. §28.
 Pollard v. Cocke, 19 Ala. 188. §199.
 ——— v. Lively, 2 Gratt. 216. §56.
 Pomeroy v. Latting, 15 Gray, 435.
 §§31, 170.
 ——— v. Stevens, 11 Met. 244.
 §§222, 229.
 Ponder v. Scott, 44 Ala. 241. §182.
 Ponton v. Ballard, 24 Tex. 619.
 §232.
 Pontz v. Reggio, 35 La. Ann. 637.
 §173.
 Pope v. Allen, 90 N. Y. 298. §§233,
 234.
 ——— v. Durant, 26 Iowa, 233.
 §210.
 ——— v. Graham, 44 Tex. 196. §47.
 ——— v. Henry, 24 Vt. 560. §8.
 ——— v. Pope, 40 Miss. 516. §§210,
 238.
 Port v. Embree, 54 Iowa, 14. §208.
 Porter v. Byne, 10 Ind. 146; s. c.
 71 Am. Dec. 305. §147.
 ——— v. Dement, 35 Ill. 478. §§55,
 56, 148.
 ——— v. Judson, 1 Gray. 175. §74.
 ——— v. Parmley, 52 N. Y. 185.
 §257.
 ——— v. Robinson, 3 A. K. Marsh,
 253. §191.
 Portis v. Hill, 30 Tex. 529; s. c. 98
 Am. Dec. 481. §§189, 216.
 Portwood v. Outton, 3 B. Mon. 247.
 §146.
 Post v. Embree, 54 Iowa, 14. §210.
 Potter v. Dooley, 55 Vt. 512. §§16,
 17.
 ——— v. Irish, 10 Gray (76 Mass.),
 416. §275.
 ——— v. McDowell, 43 Mo. 93.
 §§199, 212.
 ——— v. Sanders, 6 Hare. 1. §2.
 ——— v. Strausky, 48 Wis. 235.
 §§145, 174, 175.
 Potts v. Davenport, 79 Ill. 455. §48.
 ——— v. Dowdall, 3 Houst. 369.
 §161.
 ——— v. N. J. Arms, etc., Co., 17
 N. J. Eq. 395. §252.

- Pouns v. Williams, 48 Tex. 141. §89.
 Powell v. Monsom, 3 Mason, 349. §115.
 Powers v. Bryant, 7 Port. 9. §73.
 — v. Freeman, 2 Lans. 127. §261.
 — v. Green, 14 Ill. 386. §250.
 — v. Jackson, 50 Cal. 429. §49.
 — v. Laffler, 73 Iowa, 283. §§168, 170.
 — v. McFerran, 2 Serg. & R. 44. §§158, 184.
 Poydras v. Laurans, 6 La. Ann. 770. §229.
 Pratt v. Battels, 28 Vt. 685. §§105, 109.
 — v. Clark, 57 Mo. 189. §20.
 Prescott v. Beyer, 34 Minn. 493. §48.
 — v. Hayes, 42 N. H. 56. §64.
 Preston v. Nash, 76 Va. 1. §§36, 203, 205, 228.
 — v. Southwick, 42 Hun, 291. §§139, 255.
 — v. Witherspoon, 109 Ind. 457; s. c. 58 Am. Rep. 417. §247.
 Prewett v. Graves, 5 J. J. Marsh, 119. §§98, 101.
 Price v. Cole, 35 Tex. 461. §42.
 — v. Hart, 29 Mo. 171. §119.
 — v. Martin, 46 Miss. 489. §154.
 — v. McComas, 21 Neb. 195. §253.
 — v. McDonald, 1 Md. 403; s. c. 54 Am. Dec. 657. §§181, 182, 189, 205, 217, 222, 226.
 Priest v. Rice, 1 Pick. 164. §198.
 Pringle v. Dunn, 37 Wis. 449; s. c. 19 Am. Rep. 772. §§8, 55, 126, 136, 143, 145, 154, 181, 182, 226, 240.
 Pritchett v. Sessions, 10 Rich. Law, 293. §241.
 Proctor v. Cooper, 2 Drew. 1. §42.
 Prosser v. Rice, 28 Beav. 68. §219.
 Prouty v. Clark, 73 Iowa, 55. §20.
 Provost v. De la Houssaye, 5 La. Ann. 610. §114.
 Prudent v. Alden, 23 Pick. 184; s. c. 34 Am. Dec. 51. §181.
 Pry v. Pry, 109 Ill. 466. §154.
 Puffer v. Reeves, 35 Hun, 480; s. c. 15 Abb. N. Cas. 388. §250.
 Pulvertorf v. Pulvertorf, 18 Ves. 84. §199.
 Purdy v. Coar, 109 N. Y. 369; s. c. 4 Am. St. Rep. 491. §144.
 Purdy v. Huntington, 46 Barb. 389; s. c. 1 Am. St. Rep. 532. §§136, 138, 156, 170, 174, 209.
 — v. —, 42 N. Y. 343. §31.
 Purvis v. Robinson, 1 Bay, 485. §56.
 Putman v. Cushing, 10 Gray (76 Mass.), 334. §274.
 Putnam v. White, 76 Me. 551. §§19, 32, 39.
 Pyle v. Maulding, 7 J. J. Marsh, 204. §§1, 126.
 — v. Warren, 2 Neb. 241. §254.
- Q.**
- Quattlebaum v. Black, 24 S. C. 48. §175.
 Quick v. Milligan, 108 Ind. 419; s. c. 58 Am. Rep. 49. §154.
 Quimby v. Boyd, 8 Colo. 191. §82.
 Quimet v. Siriois, 124 Mass. 162. §57.
 Quincy Coal Co. v. Hood, 77 Ill. 68. §244.
 Quinn v. Davis, 78 Pa. St. 15. §247.
 — v. Logan, 67 Tex. 601. §§47, 136.
 Quiriague v. Dennis, 24 Cal. 154. §273.
- R.**
- Rackleff v. Norton, 19 Me. 274. §84.
 Racouillat v. Rene, 32 Cal. 450. §182.
 — v. Sausevain, 32 Cal. 376. §146.
 Railroad v. Phillips, 60 Ill. 193. §250.
 Railway Co. v. Joliet, 79 Ill. 25. §49.
 Raines v. Walker, 77 Va. 92. §§54, 141, 189.
 Ralls v. Graham, 4 Mon. 120. §184.
 Ralston v. Moore, 83 Ky. 571. §§69, 91, 92, 97.
 Ramsay's Appeal, 2 Watts, 232. §10.
 Ramsdell v. Fuller, 28 Cal. 38. §§177, 182.
 Ramsey v. Jones, 41 O. St. 685. §154.
 — v. Riley, 13 Ohio, 157. §150.
 Randall v. Baker, 20 N. H. 335. §271.
 — v. Silverthorn, 4 Pa. St. 173. §230.

- Randolph v. Meeks, Mart. & Y. 58. §233.
- Ranney v. Hardy, 43 O. St. 157. §§164, 216, 222, 228, 235.
- v. Hogan, 1 Tex. Un. Cas. 253. §§14, 37, 166, 199.
- Ransom v. Schmela, 13 Neb. 77. §196.
- Ransone v. Frayser, 10 Leigh, 592. §231.
- Ratcliff v. Longston, 18 Md. 391. §211.
- Rateau v. Bernard, 3 Blatchf. 244. §245.
- Ratteree v. Conley, 74 Ga. 153. §225.
- Raverty v. Fridge, 3 McLean, 230. §§97, 120.
- Rawles v. Deshler, 3 Keyes, 572. §§247, 250.
- Rawley v. Berrian, 12 Ill. 198. §72.
- Rawlings v. Bean, 80 Mo. 614. §§41, 218, 269.
- v. Hunt, 90 N. C. 270. §273.
- Rawson v. Richards, 69 Wis. 643. §251.
- v. Tuel, 47 Me. 506. §251.
- Ray v. Crouch, 10 Mo. App. 321. §106.
- v. Ray, 1 Idaho. 566. §114.
- Raymond v. Morrison, 59 Iowa, 371. §27.
- Raynor v. Wilson, 6 Hill, 469. §§162, 214.
- Read v. Richman, 1 Green, 49. §3.
- Reasoner v. Edmundson, 5 Ind. 393. §75.
- Record v. Williams, 7 Wheat. 59. §28.
- Redden v. Miller, 95 Ill. 336. §§216, 233.
- Redewill v. Gillen (N. M.), 12 Pac. Repr. 872. §§247, 249.
- Reed v. Burlington, etc., Ry., 72 Iowa, 166. §244.
- v. Douthit, 62 Ill. 348. §144.
- v. Eanes, 19 Ill. 595. §250.
- v. Gannon, 50 N. Y. 345. §§40, 245.
- v. Gorman, 3 Daly, 414. §204.
- v. Howard, 71 Tex. 204. §95.
- v. Kemp, 16 Ill. 445. §§53, 56.
- v. Ownby, 44 Mo. 204. §10.
- Reeder v. Burr, 4 Ohio, 446, 458. §§177, 222.
- Reeder v. The George's Creek, 3 Hughes, 584. §270.
- Rees v. Chicago, 38 Ill. 322. §49.
- v. Coats, 65 Ala. 256. §273.
- Reese v. Corlew, 60 Tex. 70. §47.
- Reeves v. Hayes, 95 Ind. 521. §§33, 173, 175.
- v. Vinacke, 1 McCrary, 213. §181.
- Reis v. Lawrence, 63 Cal. 129. §118.
- Renick v. Dawson, 55 Tex. 102. §§177, 181, 213.
- v. Frazier, 55 Tex. 102. §221.
- v. Ludington, 14 W. Va. 367. §42.
- Repp v. Repp, 12 Gill & J. 341. §207.
- Reynolds v. Case, 60 Mich. 76. §§257, 261.
- v. Darling, 42 Barb. 418. §163.
- v. Harris, 14 Cal. 667; s. c. 76 Am. Dec. 459. §§48, 191.
- v. Kingsbury, 15 Iowa, 238. §79.
- v. Ruckman, 35 Mich. 80. §224.
- Rhea v. Rhenner, 1 Pet. 105; s. c. 7 Curtis, 478. §118.
- Rhines v. Phelps, 3 Gilm. 460. §250.
- Rhodes v. Canfield, 8 Paige, 545. §§31, 170.
- Rhutael v. Stephens, 68 Iowa, 627. §§233, 253.
- Rice v. Cobb, 9 Cush. 303. §266.
- v. Dewy, 54 Barb. 455. §§171, 226.
- v. Kohn, 70 Wis. 323. §258.
- v. Peacock, 37 Tex. 392. §§107, 111.
- v. Rice, 2 Drew. 1. §230.
- Rich v. Flanders, 39 N. H. 304. §97.
- v. Roberts, 48 Me. 548. §§41, 216, 264.
- Richards v. Myers, 63 Ga. 762. R§§133, 169, 192.
- v. Randolph, 5 Mason, 115. §73.
- Richardson v. Henry (Iowa), 40 N. W. Repr. 115. §19.
- v. White, 18 Cal. 102. §43.
- Richeson v. Richeson, 2 Gratt. 497. §169.
- v. Simmons, 47 Mo. 20. §118.
- Ricks v. Reed, 19 Cal. 551. §54.
- Rider v. Edgar, 54 Cal. 127. §274.

- Ridgley v. Howard, 3 H. & McH., 211. §89.
- Ridgway & Co.'s Appeal, 15 Pa. St. 177. §42.
- Ridley v. McGee, 2 Dev. 40. §151.
- Riecke v. Westenhoff, 10 Mo. App. 358. §§90, 95.
- Ries v. Ludington, 13 Wis. 276; s. c. 80 Am. Dec. 741. §172.
- Rigg v. Fuller, 54 Ala. 141. §235.
- Riggs v. Boylan, 4 Biss. 445. §§87, 119.
- Righter v. Forrester, 11 Bush, 278. §212.
- Rigler v. Cloud, 2 Harris, 361. §79.
- Riley v. Quigley, 50 Ill. 304; s. c. 99 Am. Dec. 516. §228.
- v. Rice, 40 O. St. 441. §217.
- Ring v. Steele, 3 Keyes, 450. §156.
- Ringgold v. Waggoner, 14 Ark. 69. §§222, 224.
- Ringo v. Wing, 49 Ark. 457. §255.
- Ringold v. Bryan, 3 Md. Ch. 488. §222.
- Ripoll v. Morena, 12 Rob. 560. §184.
- Rippetoe v. Dwyer, 65 Tex. 703. §239.
- Roach v. Riverside Co., 74 Cal. 263. §43.
- v. Karr, 18 Kan. 529. §§240, 241.
- Roads v. Symmes, 1 Ohio, 315. §54.
- Roane v. Baker, 120 Ill. 308. §172.
- Roarty v. Mitchell, 7 Gray, 243. §111.
- Robbins v. Harris, 96 N. C. 557. §110.
- v. Moore (Ill.), 21 N. E. Repr. 934. §154.
- Roberts v. Austin, 26 Iowa, 327. §§211, 254.
- v. Bauer, 35 La. Ann. 453. §§147, 180.
- v. Bourne, 23 Me. 165; s. c. 39 Am. Dec. 614. §§27, 183.
- v. Grace, 16 Minn. 126. §216.
- v. Halstead, 9 Pa. St. 32; 49 Am. Dec. 541. §175.
- v. McClelland, 82 Ill. 534. §48.
- v. Mosley, 64 Mo. 407. §§216, 222.
- Robertson v. Brown, 5 La. Ann. 154. §136.
- v. Kennedy, 1 Stew. 245. §56.
- Robertson v. Queen (Tenn.), 11 S. W. Repr. 38. §186.
- Robeson's Appeal, 117 Pa. St. 623. §201.
- Robidoux v. Cassilegi, 10 Mo. App. 516. §70.
- Robinson v. Lake, 14 Iowa, 424. §223.
- v. Levi, 81 Ala. 134. §245.
- v. Rice, 3 Mich. 235. §276.
- v. Thrailkill, 110 Ind. 117. §233.
- v. Willoughby, 70 N. C. 358. §§12, 30, 165.
- Rochereau v. Delacroix, 26 La. Ann. 584. §§187, 196, 217.
- Rockafellow v. Oliver, 41 Ark. 169. §117.
- Rockwell v. McGovern, 69 N. Y. 294. §204.
- Rodemeyer v. Rodman, 5 Iowa, 426. §101.
- Rodgers v. Burchard, 34 Tex. 453. §184.
- v. Gibson, 4 Yeates, 111. §199.
- Roe v. Maund, 48 Ga. 461. §133.
- v. Tranmar, Willes, 682. §125.
- Rogers v. Adams, 66 Ala. 600. §§76, 79, 125.
- v. Benner, 45 N. Y. 379. §§192, 199.
- v. Gibson, 4 Yeates, 111. §10.
- v. Haskins, 14 Ga. 166. §224.
- v. Jones, 8 N. H. 264. §§182, 220, 228.
- v. Tucker, 94 Mo. 346. §§168, 172.
- v. Wiley, 14 Ill. 65; s. c. 56 Am. Dec. 491. §§182, 223.
- v. Whitehouse, 71 Me. 222. §251.
- Rogers' Locomotive Works v. Lewis, 4 Dill. 158. §248.
- Rohrer v. Roanoke Bank, 83 Va. 589. §§98, 101, 186.
- Roll v. Rea, 50 N. J. L. 266. §§154, 236.
- Rolland v. Hart, L. R., 6 Ch. 678. §§216, 242, 243.
- Rollins v. Henry, 78 N. C. 342. §§43, 130.
- v. Menager, 22 W. Va. 461. §49.
- Roney v. Moss, 76 Ala. 491. §§106, 107.

- Rood v. Welch, 28 Conn. 157. §253.
 Rooney v. Michael, 84 Ala. 585. §§117, 119.
 Root v. Harl, 62 Mich. 420. §256.
 Roseman v. Miller, 84 Ill. 297. §§204, 205.
 Rosenheim v. Hartsock, 90 Mo. 357. §43.
 Rosenthal v. Griffin, 23 Iowa, 263. §77.
 — v. Mayhugh, 33 O. St. 155. §118.
 — v. Ruffin, 60 Md. 324. §29.
 Ross v. Kornrumpf, 64 Tex. 390. §§114, 200.
 — v. McLung, 6 Pet. 283. §§87, 128.
 — v. Prentiss, 4 McLean, 106. §200.
 — v. Whitson, 6 Yerg. 50. §20.
 — v. Worthington, 11 Minn. 438; s. c. 88 Am. Dec. 95. §§97, 145.
 Rosser v. Cheney, 61 Ga. 468. §221.
 Rountree v. Britt, 94 N. C. 104. §273.
 Routh v. Spencer, 38 Ind. 393. §§4, 14.
 Rowley v. Bartholomew, 37 Iowa, 374. §253.
 — v. Bigelow, 12 Pick. 307. §245.
 Roxborough v. Messick, 6 Ohio St. 448; s. c. 67 Am. Dec. 346. §§202, 204, 208.
 Royal v. Lisle, 15 Ga. 545. §234.
 Roylance v. San Luis Hotel, 74 Cal. 273. §46.
 Ruffier v. Womack, 30 Tex. 332, 340. §231.
 Ruffner v. McLenan, 16 Ohio, 639. §§100, 103, 108.
 Ruggles v. Williams, 1 Head. 141. §§4, 132.
 Ruis v. Chambers, 15 Tex. 586. §96.
 Ruleman v. Pritchett, 56 Tex. 482. §§107, 110.
 Rumfelt v. Clemens, 10 Wright, 455. §99.
 Rupert v. Mark, 15 Ill. 540. §§158, 237.
 Rush v. Mitchell, 71 Iowa, 333. §205.
 Rushin v. Shields, 11 Ga. 636; s. c. 56 Am. Dec. 436. §§124, 129.
 Russ v. Wingate, 30 Miss. 440. §§71, 72.
 Russell v. Baptist Union, 73 Ill. 341. §90.
 — v. Fillmore, 15 Vt. 130. §§41, 247, 254.
 — v. Petree, 10 B. Mon. 184. §§182, 223, 226.
 — v. Rumsey, 35 Ill. 362. §97.
 — v. Sweezey, 22 Mich. 235. §§226, 241.
 Rust v. Goff, 94 Mo. 511. §§90, 121.
 Ruth v. Ford, 9 Kan. 17. §207.
 Rutherford v. Tracy, 48 Mo. 325. §49.
 Ryan v. Carr, 46 Mo. 483. §§23, 26, 54.
 — v. Chew, 13 Iowa, 589. §173.
 — v. Clanton, 3 Strobb. L. 411. §266.

S.

- Sacerdote v. Duralde, 1 La. 485. §150.
 Sacridier v. Brown, 3 McLean, 483. §64.
 Saddler v. Lewes, 42 Ark. 148. §245.
 Saffold v. Wade, 51 Ala. 214. §207.
 Saint Andrews Church v. Tompkins, 7 Johns. Ch. 14. §171.
 Saint Croix Land Co. v. Ritchie, 73 Wis. 409. §143.
 Saint John v. Conger, 40 Ill. 537. §§56, 158.
 — v. Spalding, 1 Thomp. & C. (N. Y.), 483. §209.
 Salisbury v. Cutting, 50 Conn. 113. §161.
 Salter v. Baker, 54 Cal. 140, §§30, 209.
 Saltus v. Everett, 20 Wend. 267; s. c. 32 Am. Dec. 541. §§40, 154, 245, 248.
 Sample v. Irwin, 45 Tex. 567. §67.
 Sampson v. Ohleyer, 22 Cal. 200. §44.
 — v. Thornton, 3 Metc. 275. §144.
 Sanborn v. Adair, 29 N. J. Eq. 338. §§13, 133, 166.
 — v. Robinson, 54 N. H. 239. §180.
 Sanders v. Harris, 5 Humph. 343. §4.
 — v. Keber, 28 O. St. 630. §249.
 — v. McAfee, 42 Ga. 250. §202.
 — v. Papoon, 4 Fla. 465. §§57, 246, 255.

- Sandford v. Wilson, 2 Tex. Civ. App., §248. §248.
- Sanford v. Bulkley, 30 Conn. 344. §78.
- v. Weeks, 38 Kan. 319; s. c. 16 Pac. Repr. 465. §§8, 233.
- Sangamon Coal Co. v. Wiggerhaus, 122 Ill. 279. §244.
- Sanger v. Craighe, 10 Vt. 555. §147.
- v. Freie Press Co. (Wis.), 41 N. W. Repr. 436. §256.
- v. Guenther, 73 Wis. 354. §§196, 250.
- Sankey v. Hawley, 118 Pa. St. 30. §32.
- San Leandro v. LeBreton, 72 Cal. 170. §49.
- Sappington v. Oeschli, 49 Mo. 244. §§10, 192.
- Sargent v. Howe, 21 Ill. 148. §210.
- v. Metcalf, 5 Gray, 306; s. c. 66 Am. Dec. 363. §249.
- v. Sturm, 22 Cal. 350. §§208, 212.
- Sartor v. Bolinger, 59 Tex. 411. §75.
- Sartwell v. North, 144 Mass. 188. §238.
- Satchell v. Doram, 4 O. St. 542. §49.
- Satterfield v. Malone, 35 Fed. Repr. 445. §§162, 224, 239, 241.
- Saunders v. Hartwell, 61 Tex. 680. §48.
- Sawyer v. Adams, 8 Vt. 172. §§136, 142.
- v. Cox, 63 Ill. 130. §60.
- v. Pennell, 19 Me. 167. §§16, §144.
- v. Prickett, 19 Wall. 146. §204.
- Saylor v. Romanet, 52 Tex. 562. §112.
- Sayre v. Hewes, 32 N. J. Eq. 652, 656. §§41, 270.
- Scales v. Wilsey, 11 Iowa, 261. §143.
- Scanlan v. Wright, 13 Pick. 523; s. c. 25 Am. Dec. 344. §62.
- Scarborough v. Arrant, 25 Tex. 129, 132. §38.
- Scharfenburg v. Bishop, 35 Iowa, 60. §82.
- Schell v. Stein, 76 Pa. St. 398; s. c. 18 Am. Rep. 416. §§17, 142, 170.
- Scherfy v. Argenbright, 1 Heisk. (Tenn.), 128. §64.
- Schleicher v. Markword, 61 Tex. 99. §42.
- Schley v. Pullman Car Co., 120 U. S. 575. §§9, 76, 77, 80, 81, 106.
- Schmidt v. Bender, 39 Kan. 437. §253.
- Schnee v. Schnee, 23 Wis. 377. §135.
- Schofield v. Jennings, 68 Ind. 232. §78.
- Schollenberger, *Ex parte*, 96 U. S. 377. §263.
- School Dist. v. Taylor, 19 Kan. 287. §228.
- Schrader v. Decker, 9 Barr, 14; s. c. 49 Am. Dec. 538. §§87, 89, 90.
- Schramm v. Gentry, 63 Tex. 583. §86.
- Schroeder v. Gurney, 73 N. Y. 430. §§10, 192.
- Schultz v. Moore, 1 McLean, 520. §§8, 52, 68, 71.
- Schultze v. Honfes, 96 Ill. 335. §§205, 210.
- Schumpert v. Dillard, 55 Miss. 348. §§208, 210.
- Schuster v. La Londe, 57 Tex. 28. §38.
- Schutt v. Large, 6 Barb. 373. §§4, 153, 155, 156, 219.
- Schayler v. Broughton, 70 Cal. 282. §182.
- Schwallback v. Chicago, etc., 69 Wis. 292; s. c. 2 Am. St. Rep. 740. §§177, 228, 233.
- Schweiss v. Woodruff (Mich.), 41 N. W. Repr. 511. §49.
- Scionneaux v. Wagnespach, 32 La. Ann. 283. §173.
- Scott v. Battle, 85 N. C. 184. §117.
- v. Calvit, 3 How. (Miss.), 158. §50.
- v. Delahunt, 65 N. Y. 128; s. c. 3 Lans. 372. §276.
- v. Elkins, 83 N. C. 424. §234.
- v. Gallagher, 11 Serg. & R. 347; s. c. 16 Am. Dec. 508. §§70, 71, 230.
- v. Hickman, Hemp. 275. §17.
- v. Leather, 3 Yeates, 184. §556, 134.
- v. Middleton, etc., Ry., 86 N. Y. 200. §242.
- v. Scott, 95 Mo. 300. §144.
- Scribner v. Lockwood, 9 Ohio, 184. §§199, 212.
- Scruggs v. Scruggs, 41 Mo. 242. §108.

- Secrest v. Jones, 21 Tex. 121. §§129, 130.
 — v. —, 30 Tex. 596. §§56, 191.
 Seever v. Delashmut, 11 Iowa, 174; s. c. 77 Am. Dec. 139. §§10, 209.
 Seixas v. Citizen's Bank, 38 La. Ann. 424. §§238, 244.
 Sellers v. Sellers, 98 N. C. 13. §§84, 131, 150.
 Seltan v. Gerdan, 48 Hun, 537. §247.
 Semon v. Terhune, 40 N. J. Eq. 364. §§142, 160, 161.
 Seneca Bk. v. Neass, 5 Denio, 329. §244.
 Senter v. Lambeth, 59 Tex. 259. §20.
 Sergeant v. Ingersoll, 15 Pa. St. 343. §223.
 Sessions v. Reynolds, 7 Sm. & M. (15 Miss.), 130. §69.
 Setter v. Alvey, 15 Kan. 157. §154.
 Sewall v. Haymaker, 127 U. S. 719. §§71, 87, 88, 98, 101, 117, 186, 189.
 Seward v. Jackson, 8 Cow. 406. §204.
 Sewell v. Holland, 61 Ga. 608. §228.
 Seymour v. Darrow, 31 Vt. 122. §§31, 137, 180.
 — v. McKinstry, 106 N. Y. 230. §231.
 Shackelford v. Beck, 80 Va. 404. §46.
 Shaffer v. Pickrell, 22 Kan. 619. §253.
 Shaller v. Brand, 6 Binn. 435; s. c. 6 Am. Dec. 489. §109.
 Shanks v. Lancaster, 5 Gratt. 110. §59.
 Shannon v. Hall, 72 Ill. 354; s. c. 22 Am. Rep. 146. §§30, 187.
 Share v. Anderson, 7 Serg. & R. 43; s. c. 10 Am. Dec. 421. §65.
 Sharp v. Fly, 9 Baxt. 4. §§20, 211.
 — v. Hamilton, 12 N. J. L. 108. §§80, 91.
 — v. Lumley, 34 Cal. 611. §44.
 — v. Shea, 32 N. J. Eq. (6 Stew.), 43. §§199, 212.
 Sharpe v. Orine, 61 Ala. 263. §78.
 — v. Pearce, 74 N. C. 600. §253.
 Shattuck v. Beardsley, 46 Conn. 386. §47.
 — v. The People, 4 Scam. 477. §72.
 Shaughnessey v. Lewis, 130 Mass. 355. §254.
 Shaw v. Chandler, 36 Miss. 296. §276.
 — v. Neale, 6 H. L. Cas. 581. §42.
 — v. Poor, 6 Pick. 86; s. c. 17 Am. Dec. 347. §§58, 78.
 — v. Wiltshire, 65 Me. 485. §§174, 235.
 Shawhan v. Wherritt, 7 How. 627. §213.
 Shearn v. Robinson, 22 S. Car. 32. §228.
 Sheets v. Allen, 89 Pa. St. 47. §28.
 Sheldon v. Benham, 4 Hill, 129; s. c. 40 Am. Dec. 271. §64.
 — v. Conner, 48 Me. 584. §§41, 218.
 — v. Holmes, 58 Mich. 138. §175.
 — v. Stryker, 42 Barb. 284; s. c. 27 How. 387. §§56, 77, 79, 129.
 Shelley v. Winder, 38 La. Ann. 182. §20.
 Shellhouse v. State, 110 Ind. 509. §49.
 Shelton v. Aultman, 82 Ala. 315. §§90, 121.
 Shepard v. Shepard, 36 Mich. 173. §225.
 Shephard v. Carriel, 19 Ill. 313. §76.
 Shepherd v. Burkhalter, 13 Ga. 443; s. c. 58 Am. Dec. 523. §§27, 143, 146, 199.
 — v. Orleans, 2 La. Ann. 100. §173.
 Sheppard v. Harrison, 54 Tex. 91. §76.
 Sherman v. Bemis, 58 Wis. 343. §43.
 — v. Kane, 86 N. Y. 57. §231.
 Sherrill v. Sherill, 73 N. C. 8. §217.
 Sherrington v. Yates, 12 Moes. & Wel. 855. §213.
 Shields v. Dyer, 86 Tenn. 41, 44. §§169, 170.
 — v. Netherland, 5 Lea, 193. §§87, 89.
 — v. Schiff, 124 U. S. 351. §173.
 Shifflet v. Morelle, 68 Tex. 382. §40.
 Shinn v. Hicks, 68 Tex. 277. §95.
 Shippen v. Whittier, 117 Ill. 232. §154.
 Shirley v. Fearn, 33 Miss. 653; s. c. 69 Am. Dec. 375. §126.

- Shirras v. Craig, 3 Cranch, 34. §§49, 149, 203.
- Shonk v. Brown, 61 Pa. St. 320. §97.
- Short v. Conlee, 28 Ill. 219. §81.
- Shove v. Larsen, 22 Wis. 142. §§6, 143.
- Show v. Wiltshire, 65 Me. 485. §31.
- Shryer v. Nickell, 55 Mo. 264. §94.
- Shryock v. Cannon, 39 Ark. 454. §186.
- Shuler v. Boutwell, 18 Huñ, 171. §269.
- Shumate v. Reavis, 49 Mo. 333. §222.
- Sibley v. Haslam, 75 Ga. 490. §131.
- v. Lettingwell, 8 Allen, 584. §§222, 229.
- Sidener v. Bible, 43 Ind. 230. §§41, 254.
- v. Parey, 77 Ind. 241. §175.
- Sidwell v. Burney, 69 Mo. 144. §§66, 70, 84.
- Sieman v. Schurck, 29 N. Y. 528. §§190, 212.
- Sieniers v. Kleburg, 56 Mo. 196. §67.
- Sigourney v. Larned, 10 Pick. 72. §131.
- v. Munn, 7 Conn. 324. §224.
- Sigworth v. Meriam, 66 Iowa, 477. §192.
- Silver Bow Co. v. Lowrey, 6 Mont. 288. §§248, 249.
- Simmons v. Havens, 101 N. Y. 427. §56.
- v. North, 3 Sm. & M. 67. §212.
- Simms v. Morse, 4 Hughes, 579. §223.
- v. Richardson, 2 Litt. 274. §205.
- Simon v. Sewell, 64 Ala. 261. §151.
- Simpson v. Blount, 3 Dev. L. 34. §223.
- v. Lovering, 3 Bush, 458; s. c. 96 Am. Dec. 252. §§64, 84.
- v. Montgomery, 25 Ark. 365; s. c. 99 Am. Dec. 228. §§61, 94, 155, 216.
- v. Morris, 3 Jones, 411. §261.
- v. Shackelford, 49 Ark. 63. §247.
- v. Simpson, 93 N. C. 373. §§98, 129.
- Sims v. Hammond, 33 Iowa, 368. §§156, 168.
- Sims v. Ray, 96 N. C. 87. §110.
- Sinclair v. Slawson, 44 Mich. 123; s. c. 38 Am. Rep. 235. §143.
- Singer v. Chalmers, 2 Utah, 542. §209.
- v. Rook, 84 Pa. St. 442; s. c. 24 Am. Rep. 204. §§89, 121.
- v. Scheible, 109 Ind. 575. §181.
- Singer Co. v. Graham, 8 Or. 17; s. c. 34 Am. Rep. 566. §149.
- Singleton v. School Dist. (Ky.), 10 S. W. Repr. 793. §223.
- v. Young, 3 Dana, 559. §261.
- Sinker v. Comparet, 62 Tex. 470. §§247, 249.
- Sisters v. Catholic Bishop, 86 Ill. 171. §90.
- Sitler v. McComas, 66 Md. 135. §§71, 75.
- Skiff v. Solaco, 23 Vt. 279. §267.
- Skinner v. Fletcher, 1 Ired. 313. §105.
- Slaton v. Singleton, 72 Tex. 209. §51.
- Sloan v. Owens, 79 Mo. 206. §57.
- Small v. Stagg, 95 Ill. 39. §164.
- Smiley v. Smiley, 114 Ind. 258. §144.
- Smith v. Acker, 23 Wend. 653. §254.
- v. Allen, 5 Allen, 454. §204.
- v. Allis, 52 Wis. 337. §§71, 87, 89, 108.
- v. Anderson, 33 Minn. 25. §134.
- v. Ayer, 101 U. S. 320. §§221, 238.
- v. Benson, 1 Hill. 176. §252.
- v. Board of Water Com'rs, 38 Conn. 208. §244.
- v. Boyd, 101 N. Y. 473. §80.
- v. Bynum, 92 N. C. 108. §§169, 171.
- v. Clews, 105 N. Y. 283. §251.
- v. Dall, 13 Cal. 510. §150.
- v. Denton, 42 Iowa, 48. §§216, 241.
- v. Elliott, 39 Tex. 201. §81.
- v. Fields, 79 Ala. 335. §273.
- v. Garden, 28 Wis. 685. §76.
- v. Head, 75 Ga. 755. §119.
- v. Hunt, 13 Ohio, 260. §§57, 78.
- v. Hutchings, 30 Mo. 385. §266.
- v. Jenks, 1 Den. 580. §§261, 274.

- Smith v. Jones, 35 Kan. 492. §254.
 ——— v. Jordan, 25 Ga. 647. §§42,
 199, 212.
 ——— v. Keohane, 6 Bradw. (Ill.),
 585. §§33, 209.
 ——— v. Kidd, 68 N. Y. 130. §175.
 ——— v. Kickerbocker, 84 N. Y.
 589. §209.
 ——— v. Lindsey, 89 Mo. 76. §187.
 ——— v. Lowry, 113 Ind. 37. §§17,
 169, 171, 174, 177, 181, 221.
 ——— v. Lozo, 42 Mich. 6. §249.
 ——— v. Lynes, 5 N. Y. 41. §§244,
 250.
 ——— v. McGuire, 67 Ala. 34.
 §§90, 108.
 ——— v. McLean, 24 Iowa, 322.
 §§253, 265.
 ——— v. Miller, 63 Tex. 72. §§228,
 236.
 ——— v. Moore, 11 N. H. 55.
 §§254, 262.
 ——— v. Neilson, 13 Lea, 461.
 §§19, 36.
 ——— v. Pollard, 19 Vt. 272. §183.
 ——— v. Portland, 30 Fed. Repr.
 734. §49.
 ——— v. Proffatt, 82 Va. 832, 851.
 §§12, 216.
 ——— v. Roth, 61 Tex. 81. §25.
 ——— v. Sarver (Pa.), 7 Atl. Repr.
 99. §46.
 ——— v. Simmons, 1 Root, 318.
 §28.
 ——— v. Smith, 13 O. St. 532. §§31,
 137.
 ——— v. ———, 12 Cal. 216; s. c.
 73 Am. Dec. 533. §114.
 ——— v. South Royalton Bk., 32
 Vt. 341; s. c. 76 Am. Dec. 179.
 §154.
 ——— v. The Bank, 21 Ala. 24.
 §27.
 ——— v. Van Gilder, 26 Ark. 527.
 §§66, 74.
 ——— v. Waggoner, 50 Wis. 155.
 §§252, 254, 256, 272.
 ——— v. Ward, 2 Root, 378; s. c.
 1 Am. Dec. 80. §§88, 121.
 ——— v. Water Com'rs, 38 Conn.
 208. §238.
 ——— v. White, 1 B. Mon. 19. §61.
 ——— v. Williams, 44 Mich. 240.
 §191.
 ——— v. ———, 38 Miss. 48. §80.
 ——— v. Yule, 31 Cal. 180; s. c. 89
 Am. Dec. 167. §§167, 216, 228,
 232, 233.
- Smithwick v. Smithwick, 49 N. Y.
 517. §120.
 Sneed v. Ward, 5 Dana, 188. §150.
 Snell v. Levitt, 110 N. Y. 595. §48.
 Snodgrass v. Ricketts, 13 Cal. 359.
 §204.
 Snow v. Lake, 20 Fla. 656; s. c. 1
 Am. St. Rep. 625. §§27, 183.
 Snowden v. Tyler, 21 Neb. 199.
 §§183, 204.
 Snyder v. Sponable, 1 Hill, 567; s.
 c. 7 Hill, 427. §239.
 Solomon v. Hathaway, 126 Mass.
 484. §250.
 Solomon's Lodge v. Montmallin,
 58 Ga. 547. §60.
 Somes v. Brewer, 2 Pick. 184.
 §84.
 Sonfield v. Thompson, 42 Ark. 46.
 §73.
 Sorrells v. Stamper, 27 La. Ann.
 630. §173.
 Souder v. Morrow, 33 Pa. St. 83.
 §§133, 167.
 Soule v. Corbley, 65 Mich. 109.
 §33.
 ——— v. Shotwell, 52 Miss. 236.
 §207.
 Southard v. Benner, 72 N. Y. 427.
 §211.
 ——— v. Cent. R. Co., 26 N. J. L.
 13. §97.
 South Car. Loan Co. v. McPherson,
 26 S. Car. 431. §132.
 Southerland v. Hunter, 93 N. C.
 §186.
 Souvignet v. Landreaux, 1 La. Ann.
 219. §173.
 Sowden v. Craig, 26 Iowa, 156; s.
 c. 96 Am. Dec. 125. §§4, 59, 152,
 252.
 Sowers v. Peterson, 59 Tex. 216.
 §77.
 Spackman v. Ott, 65 Pa. St. 131.
 §211.
 Spader v. Lawler, 17 O. St. 371.
 §164.
 Spadone v. Manvel, 2 Daly, 263.
 §240.
 Spafford v. Warren, 47 Iowa, 47.
 §119.
 ——— v. Weston, 29 Me. 140. §180.
 Sparks v. State Bank, 7 Blackf.
 469. §170.
 Sparr v. Trimble, 1. Marsh. 279.
 §148.
 Sparrow v. Hovey, 44 Mich. 63.
 §233.

- Sparrow v. Sparrow, 41 Mich. 708. §§66, 73.
- Spaulding v. Scanlan, 6 B. Mon. 363. §168.
- Speck v. Riggin, 40 Mo. 405. §222.
- Speed v. Brooks, 7 J. J. Marsh. 119. §144.
- Spencer v. Barnett, 35 N. Y. (8 Tiff.), 96. §45.
- Spielman v. Kliest, 9 Stew. (36 N. J. Eq.), 199. §§28, 160, 241.
- Spitznagle v. Vanhessch, 13 Neb. 338. §§80, 81.
- Spivey v. Grant, 96 N. C. 214. §253.
- Sprague v. Rockwell, 51 Vt. 401. §33.
- v. White, 73 Iowa, 670. §230.
- Sprights v. Hawley, 39 N. Y. 141; s. C. 100 Am. Dec. 452. §§247, 248.
- Spoofford v. Weston, 29 Me. 140. §222.
- Spoor v. Phillips, 27 Ala. 193. §26.
- Spurlock v. Sullivan, 36 Tex. 511. §§204, 207, 208, 224.
- Stadtfield v. Huntsman, 92 Pa. St. 53. §250.
- Stafford v. American Mills Co., 13 R. I. 310. §263.
- v. Ballou, 17 Vt. 329. §171.
- v. Van Rensselaer, 9 Cow. 316. §170.
- Stallcup v. Pyron, 33 La. Ann. 1249. §§52, 56.
- Standard Paper Co. v. Guenther, 67 Wis. 101. §§196, 254, 256.
- Standiford v. Standiford, 97 Mo. 231. §144.
- Stanhope v. Dodge, 52 Md. 483. §§133, 194, 271.
- v. Varney, 2 Eden, 81. §§14, 153.
- Stanley v. Chamberlain, 39 N. J. L. 565. §§221, 238.
- v. Gaylord, 1 Cush. 536; s. C. 48 Am. Dec. 643. §247.
- v. Green, 12 Cal. 148. §239.
- Stannis v. Nicholson, 2 Or. 332. §192.
- Stansberry v. Pope, 4 Bibb. 492. §61.
- Stansell v. Roberts, 13 Ohio, 148. §§30, 132, 172.
- Stanton v. Button, 2 Conn. 527. §§81, 82.
- Staples v. Fenton, 5 Hun, 572. §230.
- Starke v. Etheridge, 71 N. C. 240. §§10, 69, 128.
- State v. Cardinas, 47 Tex. 251. §96.
- v. Cooper, 79 Mo. 464. §254.
- v. Garriss, 98 N. C. 733. §273.
- v. Logan, 100 N. C. 454. §273.
- v. McGlynn, 20 Cal. 271. §50.
- v. Merritt, 70 Mo. 275. §176.
- v. Voorhies (La.), 2 South. Repr. 37. §276.
- v. Washoe, 5 Neb. 320. §271.
- Staton v. Davenport, 95 N. C. 4. §§217, 228.
- Stator v. Neal, 64 Tex. 222. §204.
- Stead v. Grosfield (Mich.), 34 N. W. Repr. 871; 4 West. Repr. 494. §17.
- Steam Co. v. Sears, 23 Fed. Rep. 313. §16.
- Stearns v. Gage, 79 N. Y. 102. §176.
- v. Morse, 47 N. H. 572. §28.
- v. Porter, 46 Conn. 313. §139.
- Stebbins v. Duncan, 108 U. S. 32. §§8, 15, 46, 53, 57, 78, 130, 134, 168, 187.
- Stedman v. Perkins, 42 Me. 130. §17.
- Steel v. Boone, 75 Ill. 457. §187.
- Steele v. Adams, 21 Ala. 534. §269.
- v. Lewis, 1 Mon. 49. §§99, 123.
- v. Mansell, 6 Rich. 437. §§7, 133.
- v. —, 6 Rich. 443. §132.
- v. Renn, 50 Tex. 468. §§50, 51.
- v. Spencer, 1 Pet. 552. §§13, 166, 201, 203.
- Stees v. Kranz, 32 Minn. 313. §181.
- Steffian v. Bank, 69 Tex. 513. §§30, 154, 207, 208, 209.
- Stegall v. Huff, 54 Tex. 193. §212.
- Stein v. Sullivan, 31 N. J. Eq. 409. §§33, 209.
- Stephens v. Shaw, 68 Tex. 261. §114.
- v. Williams, 46 Iowa, 540. §§66, 189.
- Stephenson v. Browning, 48 Ill. 78. §242.
- Stery v. Arden, 1 Johns. Ch. 261. §221.
- Stevens v. Brown, 3 Vt. 420; s. C. 23 Am. Dec. 215. §134.
- v. Buffalo, etc., Ry. Co., 31 Barb. 590. §§252, 270.

- Stevens v. Castel, 63 Mich. 111. §§144, 231.
 — v. Doe, 6 Blackf. 475. §§103, 107.
 — v. Geiser, 71 Tex. 140. §25.
 — v. Goodenough, 26 Vt. 676. §§238, 239.
 — v. Hampton, 46 Mo. 404. §§35, 52, 55, 65, 67.
 — v. Hollister, 18 Vt. 294. §235.
 — v. Hulin, 53 Mich. 93. §231.
 — v. Owens, 25 Me. 94. §115.
 — v. Williams, 46 Iowa, 540. §54.
 Stevenson v. Tex. Ry. Co., 105 U. S. 703. §§169, 196, 199.
 Steward v. Beale, 7 Hun, 405; s. c. 68 N. Y. 629. §§196, 234, 252.
 — v. Hopkins, 30 O. St. 502. §217.
 Stewart v. Cole, 43 Hun, 164. §§246, 257.
 — v. Dutton, 39 Ill. 91. §78.
 — v. Huff, 19 Iowa, 557. §50.
 — v. Jaques, 77 Ga. 365; s. c. 4 Am. St. Rep. 86. §253.
 — v. Kirkland, 19 Ala. 162. §177.
 — v. Long Island Ry., 102 N. Y. 601. §236.
 — v. Matthews, 19 Fla. 752. §§54, 131, 182.
 — v. McSweeney, 14 Wis. 492. §187.
 — v. Platt, 101 U. S. 731. §§41, 211, 213, 254, 261, 264.
 — v. Smith, 36 Minn. 82. §172.
 Stiffler v. Retzlaff (Pa.), 11 Atl. Repr. 876. §230.
 Stillwell v. McDonald, 39 Mo. 282. §189.
 Stilwell v. Adams, 29 Ark. 346. §§9, 105.
 Stinnett v. House, 1 Tex. Un. Cas. 484. §§128, 150.
 Stinson v. Minor, 34 Ind. 89. §§275, 276.
 — v. Ross, 51 Me. 556. §19.
 — v. Russell, 2 Tenn. 40. §72.
 Stockett v. Taylor, 3 Md. Ch. 537. §179.
 Stockman v. Allard, 2 Hun, 67. §257.
 Stockton v. Craddick, 4 La. Ann. 282. §209.
 Stockwell v. McHenry 107 Pa. St. 237. §142.
- Stockwell v. Stockwell, 101 Ind. 1. §171.
 Stoddard v. Rattan, 5 Bosw. 378. §32.
 — v. Sloan, 65 Iowa, 680. §74.
 Stoker v. Bailey, 62 Tex. 299. §114.
 Stokes v. Balaam, 73 Cal. 154. §240.
 — v. Riley, 121 Ill. 166. §§135, 223, 238.
 Stoll v. Harrison, 73 Ind. 20. §91.
 Stone v. Cook, 79 Ill. 424. §§236, 237.
 — v. French, 37 Kan. 145; s. c. 1 Am. St. Rep. 237. §154.
 — v. Marvel, 45 N. H. 481. §271.
 — v. Montgomery, 35 Miss. 83. §§90, 93, 215.
 — v. Perry, 60 Me. 48. §251.
 — v. Stone, 43 Ark. 160. §186.
 — v. Welling, 14 Mich. 514. §164.
 Stonebraker v. Ford, 81 Mo. 532. §253.
 — v. Kerr, 40 Ind. 186. §256.
 Story v. Lord Windsor, 2 Atk. 630. §206.
 Stout v. Hyatt, 13 Kan. 232. §203.
 Stowe v. Meserve, 13 N. H. 46. §239.
 Straight v. Harris, 14 Wis. 509. §162.
 Stramler v. Coe, 15 Tex. 211. §128.
 Stratton v. Shoenbar (Me.), 10 Atl. Repr. 446. §46.
 Strauch v. Hathaway, 101 Ill. 11; s. c. 40 Am. Rep. 193. §§88, 90.
 Streater v. Jones, 3 Hawks. 423. §231.
 Strickland v. Kirk, 51 Miss. 795. §228.
 Stringer v. Swenson, 63 Tex. 7. §112.
 Strohm v. Good, 113 Ind. 93. §§2, 4, 216.
 Strolberg v. Brandenburg, 39 Minn. 348. §253.
 Strong v. Brewer, 17 Ala. 706. §130.
 — v. Lynn, 38 Minn. 315. §§27, 183.
 — v. Shea, 83 Ill. 575. §231.
 — v. Smith, 3 McLean, 362. §§56, 75.
 Stroud v. Casey, 25 Tex. 740. §191.

- Stroud v. McDaniel, 12 Lea, 617. §§91, 95, 97.
 — v. Pace, 35 Ark. 100. §20.
 Stuart v. Broome, 59 Tex. 466. §47.
 — v. Dutton, 39 Ill. 91. §§80, 83.
 Studebaker v. McCurgur, 20 Neb. 500. §205.
 Stults v. Kohn, 64 Ala. 186. §54.
 Stultz v. Brown, 112 Ind. 370. §20.
 Sturges v. Bank, 3 McLean, 140. §§196, 217.
 Sturgis v. Warren, 11 Vt. 433. §254.
 Stuyvesant v. Browning, 33 N. Y. 203. §168.
 — v. Hone, 1 Sand. Ch. 419; s. c. 2 Barb. Ch. 151. §163.
 Subert v. Rosser, 24 Minn. 155. §49.
 Succession of Falconer, 4 Rob. 7. §16.
 Succession of Gale, 30 La. Ann. 351. §173.
 Suit v. Woodhall, 113 Mass. 391. §238.
 Sullivan v. Miller, 40 Hun, 516. §211.
 Summers v. Darne, 31 Gratt. 791. §172.
 Sumner v. Conant, 10 Vt. 9. §116.
 — v. Dalton, 58 N. H. 295. §271.
 — v. Vaughn, 56 Ill. 539. §35.
 — v. Woods, 67 Ala. 139; s. c. 42 Am. Rep. 104. §§247, 249.
 Sutton v. Jervis, 31 Ind. 265; s. c. 99 Am. Dec. 631. §§221, 222, 228.
 Swan v. Ligan, 1 McCord Eq. 227. §204.
 — v. Moore, 14 La. Ann. 833. §229.
 — v. Vogel, 31 La. Ann. 38. §142.
 Swartout v. Curtis, 5 N. Y. 301; s. c. 55 Am. Dec. 345. §175.
 Swartz v. Chickering, 58 Md. 290. §169.
 — v. Leist, 13 O. St. 419. §175.
 — v. Stees, 2 Kan. 436. §199.
 Sweeney v. Bixler, 69 Ala. 539. §207.
 Sweet v. Green, 1 Paige Ch. 473. §27.
 Swenson v. Bank, 9 Lea, 723. §§16, 136.
 Swift v. Hall, 23 Wis. 532. §141.
 — v. Hart, 12 Barb. 530. §259.
 Swift v. Smith, 102 U. S. (12 Otto), 442. §176.
 Swigert v. The Bank of Ky., 17 B. Mon. 268. §§14, 36.
 Swink v. Thompson, 31 Mo. 336. §48.
 Switzer v. Knapps, 10 Iowa, 72; s. c. 74 Am. Dec. 375. §§74, 136, 150.
 Swope v. Stanzeberger, 59 Tex. 387. §47.
 Sword v. Low, 122 Ill. 487. §252.
 Sydnor v. Roberts, 13 Tex. 593; s. c. 65 Am. Dec. 84. §154.
 Sykes v. Keating, 118 Mass. 517. §44.
 — v. Sykes, 49 Miss. 190. §115.

T.

- Tabor v. Hamlin, 97 Mass. 489; s. c. 93 Am. Dec. 113. §24.
 — v. Sullivan (Colo.), 20 Pac. Repr. 437. §166.
 Tagg v. Tenn. Nat. Bk., 9 Heisk. 479. §§238, 239, 243.
 Tait v. Crawford, 1 McCord, 475. §216.
 Talbot v. Dull, 70 Tex. 675. §§79, 128, 130.
 Talbot v. Simpson, 1 Pet. C. C. 188. §§79, 106, 107.
 Talbott v. Hoosier, 12 Bush, 408. §62.
 Tankard v. Tankard, 79 N. C. 54. §222.
 Tannahill v. Tuttle, 3 Mich. 104. §24.
 Tanner v. Bell, 61 Ga. 584. §172.
 Tarbell v. West, 86 N. Y. 280. §§36, 39, 162.
 Tarpey v. Desert Salt Co., 14 Pac. Repr. 338. §§87, 145.
 Tarpley v. Hamer, 9 Sm. & M. 310. §3.
 Tate v. Lawrence, 11 Heisk. 503. §§125, 127.
 Tatum v. Holliday, 59 Mo. 422. §210.
 — v. White, 95 N. C. 453. §§62, 130.
 Taylor v. Atlantic Ry. Co., 55 How. Pr. 275. §171.
 — v. Boyd, 3 Ohio, 337, 352. §191.
 — v. Doe, 13 How. 287. §§30, 198.

- Taylor v. Harrison, 47 Tex. 454; s. c. 26 Am. Rep. 304. §§8, 16, 27, 52, 184.
 — v. Hotchkiss, 2 La. Ann. 917. §§17, 42.
 — v. Huck, 65 Tex. 238. §47.
 — v. Kelley, 3 Jones Eq. 240. §233.
 — v. Lauer, 26 La. Ann. 307. §191.
 — v. Lowenstein, 50 Miss. 278. §233.
 — v. Maris, 5 Rawle, 51. §§163, 164.
 — v. Moseley, 57 Miss. 544. §§234, 236.
 — v. Stibbert, 2 Ves., Jr., 437. §236.
 — v. Thomas, 5 N. J. Eq. 331. §4.
 Tefft v. Munson, 57 N. Y. 97. §§22, 154, 161.
 Tefft v. Horton, 53 N. Y. 377. §252.
 Templeman v. Hamilton, 37 La. Ann. 754. §241.
 Tenny v. East Warren, 43 N. H. 343. §60.
 TerHoven v. Kerns, 2 Barr, 96. §164.
 Terrell v. Andrew County, 44 Mo. 309. §17.
 — v. Martin, 64 Tex. 121. §59.
 Tessier v. Hall, 7 Mart. 411. §§148, 189.
 Testart v. Belot, 31 La. Ann. 795. §154.
 Tett v. Rogers, 12 Bush, 564. §90.
 Texas v. White, 7 Wall. 700; s. c. 25 Tex. Sup. 467, 608. §64.
 Texas Land Co. v. Williams, 51 Tex. 51. §§23, 73, 190.
 Thames v. Rembert, 63 Ala. 561. §208.
 Thaxton v. Roberts, 66 Ga. 704. §139.
 Thayer v. Torrey, 37 N. J. L. 339. §§100, 104.
 The Amelie, 6 Wall. 18. §276.
 The Archer, 15 Fed. Repr. 276. §275.
 The Aull Savings Bk. v. Aull, 80 Mo. 199. §228.
 The Charlotte Vanderbilt, 19 Fed. Repr. 219. §276.
 The Circassian, 11 Blatchf. 472. §276.
 The City of Tawas, 3 Fed. Repr. 170. §276.
 The Conception, 6 Wheat. 235. §276.
 The Conn. Ins. Co. v. Talbot, 113 Ind. 373; s. c. 3 Am. St. Rep. 655. §§33, 154, 174, 175, 190, 209.
 The Distilled Spirits, 11 Wall. 356. §§238, 241, 244.
 The Ellen Holgate, 30 Fed. Repr. 125. §275.
 The Favorite, 3 Saw. 405. §276.
 The Feronia, 2 Adm. & E. 65. §276.
 The Gallego, 30 Fed. Repr. 271. §73.
 The Grace Greenwood, 2 Biss. 131. §276.
 The Granite State, 1 Sprague, 277. §276.
 The Great Western Ry., etc., v. Wheeler, 20 Mich. 419. §244.
 The Harrison, 2 Abb. (U. S. Dist. of Cal.), 74. §276.
 The Hiawatha, 5 Saw. 160. §276.
 The Int. Bank v. Wilshire, 108 Ill. 143. §174.
 The John T. Moore, 3 Woods, 61. §275.
 The Kate Hinchman, 7 Biss. 238. §275.
 The Live Oak, 30 Fed. Repr. 78. §276.
 The Lotus No. 2, 26 Fed. Repr. 637. §275.
 The Matter of Wool, 36 Mich. 299. §121.
 The People v. Chapin, 104 N. Y. 96. §177.
 The Pioneer, 30 Fed. Repr. 206. §275.
 The Romp, Olcott's Adm. 196. §275.
 The State v. Sais, 47 Tex. 309. §96.
 The Tonawanda, 29 Fed. Repr. 877. §§275, 276.
 The Wm. T. Graves, 8 Ben. 568. §276.
 —, 14 Blatchf. 189. §276.
 The New York Bank's Appeal, 36 Pa. St. 458. §42.
 Thibodeaux v. Anderson, 34 La. Ann. 797. §§35, 210.
 Thomas v. Kelley, 13 Ired. 43. §234.
 — v. Kelsey, 30 Barb. 268. §§171, 192.
 — v. Kennedy, 24 Iowa, 397. §6.
 — v. Meir, 18 Mo. 573. §§107, 115.

- Thomas v. Nelson, 69 N. Y. 118. §28.
 — v. Richards, 69 Wis. 671. §251.
 — v. The Kosciusko, 11 N. Y. Leg. Obs. 38. §276.
 — v. Thomas, 10 Ired. 123. §54.
 — v. Vanlieu, 28 Cal. 616. §198.
 Thompson v. Banks, 2 Md. Ch. 430. §231.
 — v. Bullock, 1 Bay, 367. §15.
 — v. Burhans, 79 N. Y. 100. §234.
 — v. Felton, 54 Cal. 547. §233.
 — v. Lyman, 28 Wis. 266. §172.
 — v. Morgan, 6 Minn. 292. §§66, 97, 145.
 — v. Phelps, 6 Dana, 390. §9.
 — v. Pioche, 44 Cal. 508. §§220, 228, 235, 236.
 — v. Scheid, 39 Minn. 102. §73.
 — v. Van Vetchen, 27 N. Y. 568. §§196, 254.
 — v. —, 5 Abb. Pr. 458. §276.
 — v. —, 6 Bosw. 373; 3 Abb. Pr. 458. §257.
 — v. Yeck, 21 Ill. 73. §250.
 Thorn v. Newsom, 64 Tex. 161; s. c. 53 Am. Rep. 747. §§27, 183.
 Thornhill v. Burthe, 29 La. Ann. 639. §147.
 Thornton v. Knox, 7 B.*Mon. 74. §20.
 Thorp v. Merrill, 21 Minn. 336. §§17, 140, 147.
 Thorpe v. Durbon, 45 Iowa, 192. §169.
 — v. Fowler, 57 Iowa, 541. §251.
 Thornson v. Schooner J. B. Martin, 26 Wis. 488. §§275, 276.
 Thorson v. Perkins, 39 Minn. 420. §37.
 Throckmorton v. Price, 28 Tex. 605; s. c. 91 Am. Dec. 334. §16.
 Thurman v. Cameron, 24 Wend. 87, 92. §§65, 69.
 Thursby v. Myers, 57 Ga. 155, 158. §158.
 Tibbetts v. Langley, 12 S. Car. 465. §172.
 Ticknor v. McClelland, 84 Ill. 471. §246.
 Tiffany v. Glover, 3 Greene, G., 387. §79.
 Tiffany v. Warren, 37 Barb. 571. §§202, 207, 245, 269, 270.
 Tift v. Dunn, 80 Ga. 14. §251.
 Tilden v. Morrison, 33 La. Ann. 1067. §§131, 173.
 Tildesly v. Lodge, 3 Smale & G. 543. §206.
 Tillinghast v. Champlin, 4 R. I. 173, 215; s. c. 67 Am. Dec. 510. §§114, 221, 224.
 Tillotson v. Pritchard, 60 Vt. 94. §§11, 127.
 Tilton v. Hunter, 24 Me. 29. §159.
 Titus v. Johnson, 50 Tex. 224. §§55, 65, 67.
 — v. Kimbro, 8 Tex. 210. §§96, 148.
 Tobin v. Bass, 85 Mo. 654. §144.
 Todd v. Outlaw, 79 N. C. 235. §§38, 55, 217.
 — v. Pittsburg, 19 O. St. 514. §49.
 — v. Union Dime Sav. Inst., 20 Abb. N. Cas. 270. §146.
 Tolbert v. Horton, 33 Minn. 104. §253.
 — v. —, 31 Minn. 518. §269.
 Tom v. Sayers, 64 Tex. 339. §114.
 Tomlin v. McChow, 5 J. J. Marsh, 135. §115.
 Tompkins v. Henderson, 83 Ala. 391. §219.
 — v. Little Rock Ry. Co., 15 Fed. Repr. 6. §165.
 — v. Powell, 6 Leigh, 576. §154.
 Tooker v. Sloan, 30 N. J. Eq. 394. §90.
 Toops v. Snyder, 47 Ind. 91. §191.
 Torrence v. Shedd, 112 Ill. 466. §183.
 Touchard v. Crow, 20 Cal. 150; s. c. 81 Am. Dec. 108. §62.
 Toulman v. Heidelberg, 32 Miss. 268. §§81, 117.
 Tourtelotte v. Pierce (Neb.), 42 N. W. Repr. 915. §21.
 Tourville v. Pierson, 39 Ill. 446. §83.
 — v. Naish, 3 P. Wms. 307. §§203, 206.
 Tousley v. Tousley, 5 O. St. 78. §147.
 Towls v. Fisher, 77 N. C. 437. §§99, 117.
 Town v. Griffith, 17 N. H. 165. §140.
 Townsend v. Hooper, 2 Utah, 348. §235.

- Townsend v. Little, 109 U. S. 509. §235.
- Tracy v. Guthrie Co., etc. 47 Iowa, 27. §242.
- v. Jenks, 15 Pick. 465. §§16, 69.
- Trader's Bk. v. Woodlawn Co., 100 N. C. 345. §169.
- Trammell v. Mount, 68 Tex. 211. §45.
- Tranum v. Wilkinson, 81 Ala. 408. §§52, 53.
- Traphagen v. Irwin, 18 Neb. 195. §162.
- Travis v. Milne, 9 Hare, 141. §239.
- Traylor v. Townsend, 61 Tex. 144. §§216, 219, 220.
- Treadwell v. Sackett, 50 Barb. 440. §76.
- Tregear v. Etiwanda Co., 76 Cal. 537. §§41, 234, 250.
- Trentman v. Eldridge, 98 Ind. 525. §155.
- Trerice v. Barteau, 54 Wis. 99. §49.
- Trezise v. Lacy, 22 Kan. 742. §233.
- Tritch v. Norton, 10 Colo. 337. §45.
- Troy City Bank v. Wilcox, 20 Wis. 671. §155.
- Trudo v. Anderson, 10 Mich. 357; s. c. 81 Am. Dec. 795. §247.
- Trull v. Bigelow, 16 Mass. 406. §§155, 157.
- v. —, 16 Mass. 418. §22.
- Trulock v. Donahoe, 76 Iowa, 758. §252.
- v. Peeples (Ga.), 3 Kelly, 446. §154.
- v. —, 1 Ga. 3. §84.
- Truman v. Love, 14 O. St. 531. §68.
- Trusdale v. Ford, 37 Ill. 210. §232.
- Trustees v. Fenno, 67 Iowa, 244. §170.
- v. Hewitt, 35 Kan. 59. §184.
- v. Hill, 12 Iowa, 462. §207.
- v. Hills, 6 Cow. 23; s. c. 16 Am. Dec. 429. §64.
- v. McKechnie, 90 N. Y. 618. §66, 71.
- v. Wheeler, 59 Barb. 585. §223.
- Tubbs v. Gatewood, 26 Ark. 128. §80, 109.
- Tucker v. Case, 39 Tex. 102. §114.
- v. Hadley, 52 Miss. 414. §20.
- v. Harris, 13 Ga. 1. §184.
- Tucker v. Tilton, 55 N. H. 223. §§238, 239.
- Tufts v. Tapley, 129 Mass. 380. §32.
- Tulane v. Levinson, 2 La. Ann. 787. §§4, 12, 165, 217.
- Tully v. Davis, 30 Ill. 103; s. c. 83 Am. Dec. 179. §77.
- v. Harloe, 35 Cal. 302. §164.
- Tunstall v. Trappes, 3 Sim. 287. §216.
- Turbeville v. Gibson, 5 Heisk. 374. §165.
- Turk v. Funk, 68 Mo. 18; s. c. 30 Mo. Rep. 771. §§160, 172.
- Turner v. McDonald, 76 Cal. 177. §294.
- v. Phelps, 46 Tex. 251. §§163, 165.
- v. Stephenson (Mich.), 40 N. W. Repr. 735. §234.
- v. Watkins, 31 Ark. 429. §210.
- Tuten v. Gazan, 18 Fla. 751. §§60, 69.
- Tuttle v. Jackson, 6 Wend. 213; s. c. 21 Am. Dec. 306. §§12, 178, 216.
- v. Turner, 28 Tex. 759. §144.
- Tweedale v. Tweedale, 23 Beav. 341. §242.
- Twelves v. Williams, 3 Whart. 485. §10.
- Tyler v. Aberg, 65 Md. 18. §211.
- v. Hammond, 28 Mass. 193. §162.
- Tyree v. Sands, 24 La. Ann. 363. §266.

U.

- Udell v. Peak, 70 Tex. 547. §236.
- Uhl v. Musques, 1 Tex. Un. Cas. 650. §56.
- v. Rau, 13 Neb. 357. §228.
- Uhlr v. Hutchinson, 23 Pa. St. 110. §10.
- Underwood v. Lilly, 10 Serg. & R. 99. §120.
- v. Lord Courtown, 2 Sch. & Lef. 40. §2.
- Union Canal Co. v. Young, 1 Whart. 410. §§201, 204, 206.
- Union Inst. v. Duryea, 67 N. Y. 84. §207.
- United States v. Crosby, 7 Cranch, 115. §145.
- v. Fox, 94 U. S. 315. §11.
- v. Samperyac, Hemp. 118. §154.

- United States v. Schurz, 102 U. S. 378. §25.
 U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381. §§4, 36, 39, 203.
 Upshaw v. Gibson, 53 Miss. 341. §99.
 — v. Hargrove, 6 Sm. & Mar. 286, 292. §207.
 Urquhart v. Womack, 53 Tex. 616. §102.
 Utley v. Fee, 33 Kan. 683. §191.
- V.**
- Valentine v. Havener, 20 Mo. 133. §199.
 — v. Lunt, 51 Hun (58 N. Y. Sup. Ct.), 544. §154.
 — v. Piper, 22 Pick. 85; s. c. 33 Am. Dec. 715. §29.
 Vallejo v. Viele, 48 Cal. 572. §161.
 Van Aken v. Gleason, 34 Mich. 477. §30.
 Van Amridge v. Morton, 4 Whart. 382; s. c. 34 Am. Dec. 517. §154.
 Van Bracklin v. Fonda, 12 Johns. 468; s. c. 7 Am. Dec. 339. §87.
 Vance v. Schuyler, 1 Gilm. 160. §§66, 70.
 — v. Vance, 108 U. S. 514. §23.
 Van Cortland v. Tozer, 17 Wend. 338; s. c. 20 Wend. 423. §§122, 128, 188.
 Vandercook v. Baker, 48 Iowa, 199. §168.
 Van Duzor v. Allen, 90 Ill. 499. §250.
 Van Heuzen v. Radcliff, 17 N. Y. 580; s. c. 72 Am. Dec. 480. §§207, 208, 214, 258.
 Van Hook v. Walton, 28 Tex. 59. §238.
 Van Keuren v. Cent. Ry., 38 N. J. Law, 165. §§216, 228, 230.
 Van Keureus v. Corkins, 66 N. Y. 77. §175.
 Van Loan v. Heffner, 30 La. Ann. 1213. §46.
 Van Meter v. Knight, 32 Minn. 205; s. c. 20 N. W. Repr. 142. §134.
 Van Ness v. U. S. Bank, 13 Pet. 17. §71.
 Vanorden v. Johnson, 14 N. J. Eq. 376; s. c. 82 Am. Dec. 254. §163.
 Van Rensaeller v. Clark, 17 Wend. 25. §§14, 61, 201.
 — v. Kearney, 11 How. 322. §27.
- Van Rensaeller v. Sheriff, 1 Cow. 801. §209.
 Van Riswick v. Goodhue, 50 Md. 57. §146.
 Varick v. Briggs, 6 Paige, 321. §154.
 Varnum v. State, 78 Ala. 28. §273.
 Vatie v. Lytle, 7 Ohio, 477. §212.
 Vattier v. Hinde, 7 Pet. 252. §§155, 181, 203, 219.
 Vaughan v. Carlisle, 2 Lea, 525. §91.
 — v. Tracy, 22 Mo. 415; s. c. 69 Am. Dec. 471. §§12, 221, 222, 228.
 Vaughn v. Bell, 9 B. Mon. 447. §261.
 — v. Ely, 4 Barb. 156. §48.
 Veazie v. Parker, 23 Me. 170. §160.
 — v. Somerby, 5 Allen (87 Mass.), 280. §§261, 275.
 Velsian v. Lewis, 15 Or. 539; s. c. 3 Am. St. Rep. 184. §§247, 249.
 Ventress v. Smith, 10 Pet. 175. §248.
 Verplank v. Sterry, 12 Johns. 536; s. c. 7 Am. Dec. 348. §204.
 Vest v. Michie, 31 Gratt. 149; s. c. 31 Am. Rep. 722. §§223, 224.
 Viele v. Judson, 82 N. Y. 32. §33.
 Village v. Reed, 21 Neb. 261. §73.
 Villavaso v. Walker, 28 La. Ann. 775. §§172, 217.
 Virgin v. Brubaker, 4 Nev. 31. §172.
 Vogan v. Caminette, 65 Cal. 438. §170.
 Voorhis v. Westervelt, 43 N. J. Eq. 612; s. c. 3 Am. St. Rep. 315. §§4, 152, 158, 172, 184, 195.
 Vose v. Morton, 4 Cush. 27; s. c. 50 Am. Dec. 750. §189.
 Vredenburg v. Burnet, 31 N. J. Eq. 229. §§31, 170, 182, 221.
 Vreeland v. Clafflin, 24 N. J. Eq. 313. §167.
- W.**
- Wade v. Strachan (Mich.), 39 N. W. Repr. 382. §259.
 Wagner v. Hodge, 34 Hun (41 N. Y. Sup. Ct.), 524. §§135, 138, 211.
 — v. Watts, 2 Cr. C. Ct. 169. §253.
 Wailes v. Cooper, 24 Miss. 208. §§203, 225.

- Wait v. Smith, 92 Ill. 385. §17.
 Waldron v. Sloper, 1 Drew. 193. §175.
 Walker v. Cucullu, 15 La. Ann. 689. §175.
 — v. Goldsmith, 14 Or. 125. §191.
 — v. Hill, 22 N. J. Eq. 514. §43.
 — v. Mebane, 90 N. C. 259. §34.
 — v. Miller, 11 Ala. 1081. §§211, 254.
 — v. Mitchell, 25 Hun, 527. §§248, 250.
 — v. Moody, 65 N. C. 599. §212.
 — v. Schreiber, 47 Iowa, 529. §221.
 Wallace v. Campbell, 54 Tex. 87. §§114, 177, 212.
 — v. Evans, 1 Dak. 387. §181.
 — v. Furber, 62 Ind. 103. §147.
 — v. Moody, 26 Cal. 387. §146.
 — v. Silsby, 13 Vroom, 1. §172.
 Wallis v. Taylor, 67 Tex. 431. §256.
 Waltee v. Weaver, 57 Tex. 569. §§59, 104, 105.
 Walter v. Hartwig, 106 Ind. 123. §§92, 135, 159.
 Walton v. Hargrove, 42 Miss. 18; s. c. 97 Am. Dec. 429. §§19, 20, 192, 199, 203.
 Wambole v. Foote, 2 Dak. 1. §98.
 Wannal v. Kem, 51 Mo. 150. §§91, 93.
 Warburton v. Lauman, 2 Greene, 420. §147.
 Ward v. Dougherty, 75 Cal. 240. §§77, 104.
 — v. Drouthett, 44 Tex. 369. §234.
 — v. Hague, 25 N. J. Eq. 397. §§163, 164.
 — v. McIntosh, 12 O. St. 231. §§103, 110.
 — v. Walters, 63 Wis. 39. §80.
 — v. Warren, 82 N. Y. 265. §238.
 — v. Watson, 24 Neb. 592. §246.
 Warden v. Sabins, 36 Kan. 165. §45.
 — v. Williams, 24 Ill. 67. §156.
 Wardlaw v. Mayer, 77 Ga. 620. §67.
 — v. Miller, 69 Tex. 395. §182.
 Ware v. Egmont, 31 Eng. L. & Eq. 89. §§177, 178.
 — v. Lord Egmont, 4 De G. M. & G. 460. §228.
 — v. Nesbit, 94 N. C. 664. §121.
 Wark v. Willard, 13 N. H. 389. §§22, 161.
 — v. —, 22 N. H. 468. §54.
 Warner v. Comstock, 55 Mich. 615. §256.
 — v. Conn., 109 U. S. 357. §69.
 — v. Hall, 53 Mich. 371. §121.
 — v. Hardy, 6 Md. 525. §§77, 79.
 — v. Peck, 11 R. I. 431. §186.
 — v. Whitaker, 6 Mich. 133. §202.
 — v. Wilson, 73 Iowa, 719. §253.
 — v. Winslow, 1 Sandf. Ch. 430. §§31, 190.
 Warren v. Branch, 15 W. Va. 21. §20.
 — v. Brown, 25 Miss. 66; s. c. 57 Am. Dec. 191. §104.
 — v. Fenn, 28 Barb. 334. §20.
 — v. Hall, 53 Mich. 371. §89.
 — v. Jones, 69 Tex. 462. §§110, 117.
 — v. Sweet, 31 N. Y. 332. §223.
 — v. Syne, 7 W. Va. 474. §147.
 Warrick v. Hull, 102 Ill. 280. §90.
 — v. Warrick, 3 Atk. 291. §241.
 Wart v. Green, 36 N. Y. 556; s. c. 35 Barb. 585. §250.
 Washburn v. Burnham, 63 N. Y. 132. §28.
 — v. Roesch, 13 Ill. App. 268. §90.
 Washington v. Trousdale, Mart. & Yerg. 385. §196.
 Washington Bk. v. Lewis, 22 Pick. 21. §244.
 Wasson v. Conner, 54 Miss. 352. §§68, 88.
 Waters v. Connelly, 59 Iowa, 217. §234.
 — v. Cox, 2 Bradw. 129. §§247, 250.
 — v. Spofford, 58 Tex. 115. §§57, 97, 128, 129, 130.
 — v. Stickney, 12 Allen, 15. §51.
 Watkins v. Edwards, 23 Tex. 443. §§204, 221.
 — v. Hall, 57 Tex. 1. §77.
 Watrous v. McGrew, 16 Tex. 506. §96.
 Watson v. Bailey, 1 Binn. 470; s. c. 2 Am. Dec. 462. §§87, 103, 105.

- Watson v. Chalk, 11 Tex. 89. §§96, 157.
 — v. Dundee, 12 Or. 474. §§33, 174, 209.
 — v. Mercer, 8 Pet. 88. §§23, 97, 102, 120.
 — v. — 27 Tex. 637. §29.
 — v. Michael, 21 W. Va. 568. §§104, 106, 107.
 — v. Spence, 20 Wend. 264. §163.
 — v. Thompson, 49 Ark. 83. §§246, 254, 263, 269.
 — v. Thurber, 11 Mich. 457. §100.
 Watts v. Griswold, 20 Ga. 732. §233.
 Waughler v. Franklin, 70 Mo. 650. §249.
 Way v. Lyon, 3 Blackf. 76. §204.
 Weathersbee v. Farrar, 90 N. C. 106. §§163, 165, 171, 217.
 Weathersby v. Weathersby, 40 Miss. 462; s. c. 90 Am. Dec. 344. §250.
 Weaver v. Barden, 49 N. Y. 286. §205.
 — v. Chunn, 99 N. C. 431. §§246, 261.
 — v. Coumbe, 15 Neb. 167. §28.
 — v. Lapsley, 42 Ala. 601; s. c. 94 Am. Dec. 671. §250.
 — v. The S. G. Owens, 1 Wall., Jr. 359. §276.
 Webb v. Burney, 70 Tex. 322. §§89, 121, 179, 204.
 — v. Chisholm, 24 S. C. 487. §54.
 — v. Den, 17 How. 578. §§97, 102.
 — v. Hoselton, 4 Neb. 308. §§204, 210.
 — v. Huff, 61 Tex. 677. §§53, 74, 79, 81, 84.
 — v. Mullins, 78 Ala. 111. §85.
 — v. Robbins, 77 Ala. 176. §223.
 — v. Webb, 87 Mo. 540. §§90, 104, 106.
 — v. Wilcher, 33 Ga. 565. §§133, 184.
 Weber v. Armstrong, 70 Mo. 217. §247.
 — v. Bridgman, 113 N. Y. 600; 23 Sup. Ct. 674. §175.
 — v. Christen, 121 Ill. 91; s. c. 2 Am. St. Rep. 68. §144.
 Webster v. Hall, 2 Har. & McH. 19; s. c. 1 Am. Dec. 370. §§105, 112.
 Webster v. Maddox, 6 Me. 236. §§222, 231.
 — v. Van Steenburg, 46 Barb. 211. §§154, 181, 207.
 Wedel v. Harmon, 59 Cal. 507. §§92, 93.
 Weed v. Stanley, 12 Fla. 166. §254.
 Weeks v. Tomes, 16 Hun. 349. §43.
 Weidner v. Thompson, 69 Iowa, 36. §169.
 Weil v. Lapeyre, 38 La. Ann. 303. §154.
 Weinberg v. Rempe, 15 W. Va. 829. §209.
 Weisberger v. Wisner, 55 Mich. 246. §232.
 Weisbrod v. Chicago, etc., 18 Wis. 41. §117.
 Weisenburg v. Truman, 58 Cal. 63. §181.
 Weisser v. Denison, 10 N. Y. 68. §240.
 Weld v. Madden, 2 Cliff. 584. §198.
 Welles v. Cole, 6 Gratt. 645. §§63, 66.
 Wells v. Atkinson, 24 Minn. 161. §§69, 75, 79.
 — v. Morrow, 38 Ala. 125. §§20, 203.
 — v. Wilcox, 68 Iowa, 708. §253.
 Wells, Fargo & Co. v. Smith & Neslin, 2 Utah, 39. §§4, 40, 152, 188.
 Welsh v. Foster, 12 Mass. 96. §1.
 — v. Hill, 2 Johns. 373. §62.
 — v. Lewis, 71 Ga. 387. §127.
 Welton v. Tizzard, 15 Iowa, 495. §209.
 Wert v. Naylor, 93 Ind. 413. §207.
 West v. Fitz, 109 Ill. 425. §210.
 — v. Krebaum, 88 Ill. 263. §67.
 — v. Reid, 2 Hare, 260. §165.
 — v. Schneider, 64 Tex. 327. §62.
 West Point Co. v. Reymert, 45 N. Y. 703. §77.
 Westbrook v. Gleason, 79 N. Y. 23. §§33, 154, 170, 203, 204, 205, 209, 228.
 Western Co. v. Peytona, 8 W. Va. 406. §228.
 Westervelt v. Voorhis, 42 N. J. Eq. 179. §169.
 — v. Wyckoff, 32 N. J. Eq. 188. §181.
 Wethered v. Boon, 17 Tex. 143. §§178, 182, 223, 225.
 Wetherell v. Spencer, 3 Mich. 123. §257.

- Wetmore v. Laird, 5 Biss. 160. §§5, 69, 74, 79, 81.
 Wheaton v. Dyes, 15 Conn. 307. §§13, 166, 205.
 Wheeler v. Becker, 68 Iowa, 723. §253.
 — v. Kirtland, 24 N. J. Eq. 552. §42.
 Wheelwright v. DePeyster, 4 Ed. Ch. 232. §162.
 Whelan v. McCreary, 64 Ala. 319. §30.
 — v. Whelan, 3 Cow. 537. §204.
 Whight v. Wood, 23 Pa. St. 120, 130. §233.
 Whitacre v. Fuller, 5 Minn. 508. §171.
 Whitbread v. Jordan, 1 You. & Coll. Ex. 303. §219.
 Whitcomb v. Woodworth, 54 Vt. 544. §251.
 White v. Burnly, 20 How. (61 U. S.), 225. §§64, 234.
 — v. Carpenter, 2 Paige, 217. §180.
 — v. Denman, 1 O. St. 110. §§10, 52.
 — v. Fisher, 77 Ind. 65; s. c. 40 Am. Rep. 287. §§234, 241.
 — v. Foster, 102 Mass. 375. §§2, 4, 12, 178, 222, 223.
 — v. Graves, 107 Mass. 325; s. c. 9 Am. Rep. 38. §§89, 100, 121.
 — v. Hampton, 13 Iowa, 259. §143.
 — v. Moore, 1 Paige, 551. §138.
 — v. Nashville Ry. Co., 7 Heisk. 518. §§19, 203.
 — v. Patten, 24 Pick. 324. §§22, 161.
 — v. Perry, 14 W. Va. 66. §43.
 — v. Stanton, 111 Ind. 540. §46.
 — v. Wager, 25 N. Y. 328. §101.
 — v. Wakefield, 7 Sim. 401. §230.
 — v. White, 105 Ill. 313. §233.
 White's Bank v. Smith, 7 Wall. 646. §§275, 276.
 White Lake Co. v. Russell, 22 Neb. 126; s. c. 3 Am. St. Rep. 262. §§45, 46.
 Whitehead v. Foley, 28 Tex. 289. §234.
 Whitehorn v. Cranz, 20 Neb. 392. §216.
 Whitehurst v. Hunter, 2 Hayw. 401. §104.
 Whitemark v. Noe, 3 Stark's Ch. 321. §47.
 Whittfield v. Riddle, 78 Ala. 99. §§199, 209.
 Whitney v. Arnold, 10 Cal. 531. §§83, 128.
 Whittmore v. Smith, 50 Conn. 376. §28.
 Whittier v. Blakeley, 13 Or. 546. §46.
 Whittington v. Wright, 9 Ga. 23. §235.
 Whittlesey v. Hughes, 39 Mo. 13. §210.
 Wickersham v. Chicago, etc., 18 Kan. 481; s. c. 26 Am. Rep. 784. §§239, 243.
 — v. Reeves, 1 Iowa, 113. §81.
 Wickes v. Caulk, 5 Har. & J. 36. §84.
 — v. Lake, 25 Wis. 71. §§221, 228, 233.
 Wickham v. Lewis, 13 Gratt. 427. §§35, 210.
 Wiele v. U. S. 7 Ct. Cl. 539. §29.
 Wigg v. Wigg, 1 Atk. 382. §§203, 206.
 Wilbraham v. Livesey, 18 Beav. 206. §181.
 Wilcox v. Smith, 5 Wend. 231; s. c. 21 Am. Dec. 213. §64.
 Wilcoxon v. Miller, 49 Cal. 193. §§10, 42, 192.
 — v. Osborn, 77 Mo. 621. §78.
 Wild v. Brooks, 10 Minn. 50. §§19, 36, 152, 267.
 Wilderman v. Harrington, 2 Tex. Civ. App. 820. §247.
 Wildgood v. Wayland, Gouldsb. 147. §225.
 Wiles v. Clapp, 41 Barb. 645. §258.
 Wiley v. Aultman, 53 Wis. 560. §271.
 — v. Knight, 27 Ala. 336. §241.
 — v. Shars, 21 Neb. 712. §253.
 Wilhelm v. Mertz, 4 Greene, 54. §28.
 Wilkins v. Wright, 6 McLean, 340. §210.
 Wilkinson v. King, 81 Ala. 156. §265.
 Willard v. Cramer, 36 Iowa, 22. §§55, 70.
 — v. Reas, 26 Wis. 540. §20.
 Willes v. Greenhill, 4 DeG. F. & J. 147, 150. §§238, 239.

- Willey v. Snyder, 34 Mich. 69. §253.
 Williams v. Baker, 71 Pa. St. 476. §§68, 87, 89, 99.
 — v. Beard, 1 S. Car. 309, §§14, 133, 194, 205.
 — v. Burbanks, 11 Md. 250. §194.
 — v. Burbeck, Hoff. (N. Y.), 359. §§28, 209.
 — v. Cudd, 26 S. Car. 213. §115.
 — v. Downing, 18 Pa. St. 60. §28.
 — v. Griffin, & Jones (N. C.), L. 31. §56.
 — v. Hobson, 6 O. St. 510. §68.
 — v. Hollingsworth, 1 Strob. Eq. 103. §204.
 — v. Jackson, 107 U. S. 478. §176.
 — v. Jones, 95 N. C. 504. §54.
 — v. Livingston, 9 N. W. Repr. (Minn.), 31. §59.
 — v. Lord, 75 Va. 390. §211.
 — v. Robson, 6 Ohio St. 510. §186.
 — v. Shelby, 37 N. Y. 375. §202.
 — v. Tatnall, 29 Ill. 553. §198.
 — v. Windsor, 12 R. I. 9. §§211, 254.
 Williamson v. Brown, 15 N. Y. 354. §§12, 153, 182, 219, 221, 223, 227, 238.
 — v. Carskadden, 36 O. St. 664. §§68, 88.
 — v. Moore, 68 Ga. 585. §127.
 — v. N. J. etc., Ry. Co. 29 N. J. Eq. 311. §§252, 270.
 — v. N. J. S. Ry. 28 N. J. Eq. 277. §254.
 Willink v. Miles, Pet. C. Ct. 429. §69.
 Willis v. Gattman, 53 Miss. 721. §105.
 — v. Gay, 48 Tex. 463. §20.
 — v. Henderson, 4 Scam. 13. §211.
 Willoughby v. Willoughby, 1 T. R. 763, 767. §§202, 209.
 Wilson v. Conway, 4 R. I. 141, 152. §240.
 — v. Eifler, 11 Heisk. 188. §§189, 218.
 — v. Hunter, 30 Ind. 466. §§152, 178, 227.
 Wilson v. Leslie, 20 Ohio, 161. §§133, 141, 255, 256.
 — v. McCullough, 23 Pa. St. 440; s. c. 62 Am. Dec. 347. §§182, 219, 225, 226.
 — v. McEwan, 7 Or. 87, 104. §128.
 — v. Milligan, 75 Mo. 41. §§41, 218, 269.
 — v. Minn. Fire Ass'n, 36 Minn. 112. §§241, 214.
 — v. Peeples, 61 Ga. 218. §172.
 — v. Prouty, 70 Cal. 196. §§273, 274.
 — v. Rudd, 70 Wis. 98. §45.
 — v. Simpson, 68 Tex. 312. §§63, 126.
 — v. Second Nat. Bk. (Pa.), 7 Atl. Repr. 145. §244.
 — v. Traer, 20 Iowa, 233. §67.
 — v. Troup, 2 Cow. 195. §29.
 — v. Voight, 9 Colo. 614. §254.
 — v. Wall, 6 Wall. 83. §226.
 — v. Williams, 25 Tex. 54. §§153, 220, 227.
 Wilt v. Cutler, 38 Mich. 189. §§56, 134, 150.
 Winchester v. Carman, 109 Ind. 31. §§247, 251.
 — v. Ry. Co., 4 Md. 231. §§242, 244.
 Windle v. Bonebrake, 23 Fed. Repr. 165. §175.
 Windom v. Schappell (Minn.), 38 N. W. Repr. 757. §§144, 162, 191.
 Wing v. McDowell, Walk. (Mich.), 175. §160.
 — v. Hall, 47 Vt. 182. §§36, 140.
 Wingo v. Parker, 19 S. Car. 13. §§98, 111.
 Winkler v. Higgins, 9 O. St. 599. §36.
 Winlock v. Hardy, 4 Lit. 472. §132.
 Winn v. Patterson, 9 Pet. 663. §95.
 Winsor v. McLelland, 2 Story, 492. §§213, 254.
 Winsted v. Spencer, 26 Conn. 195. §145.
 Wisconsin Cent. Ry. v. Wis. River Land Co., 71 Wis. 94. §44.
 Wise v. Postlewait, 3 W. Va. 452. §§57, 78.
 — v. Wise, 2 Jones & Lat. 403. §238.
 Wiswall v. McGowan, 2 Barb. 281; s. c. Hoffman's Ch. 125. §239.

- Withers v. Baird, 7 Watts, 227; s. c. 32 Am. Dec. 754. §67.
 — v. Carter, 4 Gratt. 407. §197.
 — v. Little, 56 Cal. 370. §207.
 Witter v. Dudley, 42 Ala. 616. §226.
 Witters v. Sowles, 32 Fed. Repr. 758. §244.
 Wofford v. McKinna, 23 Tex. 36. §§21, 29.
 Wolf v. Fogarty, 6 Cal. 224; s. c. 65 Am. Dec. 509. §§76, 77.
 Wolfe v. Dyer, 95 Mo. 545. §178.
 Wolfolk v. Graniteville Co., 22 S. C. 332. §§11, 122.
 Womack v. Hughes, Littell's Sel. Cas. 292. §61.
 — v. Womack, 8 Tex. 397. §102.
 Womble v. Battle, 2 Ired. Eq. 182. §§4, 20.
 Woodbourne v. Gorrell, 66 N. C. 82. §§68, 101.
 Woodbury v. Fisher, 20 Ind. 387; s. c. 83 Am. Dec. 325. §§144, 154, 190.
 Wood v. Bach, 54 Barb. 134. §76.
 — v. Chapin, 13 N. Y. 509, 515; s. c. 67 Am. Dec. 52. §§10, 154, 199, 204, 212, 214.
 — v. Cochrane, 39 Vt. 544. §57.
 — v. Farmere, 7 Watts, 382; s. c. 32 Am. Dec. 772. §§50, 51, 162, 228, 230, 232.
 — v. Harrow, 11 Johns. 434. §129.
 — v. Ingraham, 3 Strobb. Eq. 105; s. c. 51 Am. Dec. 671. §144.
 — v. Jackson, 3 Wend. 9; s. c. 22 Am. Dec. 603. §191.
 — v. Lake, 62 Ala. 489. §210.
 — v. Lordier, 115 Ind. 519. §168.
 — v. Lowry, 17 Wend. 492. §254.
 — v. Mann, 1 Sumn. 503. §154.
 — v. Reeves, 23 S. C. 382. §§69, 128.
 — v. Weimar, 104 U. S. (14 Otto), 786. §§246, 257, 259.
 — v. Welder, 42 Tex. 397. §96.
 Woodcock v. Bennett, 1 Cow. 711. §191.
 Woodfolk v. Blount, 3 Hayw. 147; s. c. 9 Am. Dec. 739. §183.
 Woodliff v. Harris, 95 N. C. 311. §273.
 Woodruff v. McHarry, 58 Ill. 218. §64.
 Woodruff v. Phillips, 10 Mich. 500. §141.
 — v. Robb, 19 Ohio, 212. §260.
 Wood's Appeal, 82 Pa. St. 110. §16.
 Woods v. Transportation Co., 84 Ala. 560. §95.
 Woodson v. Allen, 54 Tex. 551. §16.
 — v. Collins, 56 Tex. 175. §§198, 236.
 Woodward v. Boro, 16 Lea (84 Tenn.), 678. §16.
 — v. Gates, 9 Vt. 358. §267.
 Woodworth v. Paige, 5 O. St. 70. §225.
 Woolen v. Hillen, 9 Gill. 185; s. c. 52 Am. Dec. 690. §175.
 Wooster v. Sherwood, 25 N. Y. 278. §40.
 Worcester Bank v. Cheeney, 87 Ill. 602. §140.
 Worcester v. Lord, 56 Me. 265; s. c. 96 Am. Dec. 456. §§228, 229, 233.
 Word v. Box, 66 Tex. 596. §§21, 159, 162.
 — v. Hollins, 14 Md. 158. §190.
 — v. Krebsbs, 30 Gratt. 708. §181.
 — v. McKinney, 25 Tex. 258. §96.
 — v. Watson, 24 Neb. 592. §256.
 Work v. Brayton, 5 Ind. 396. §207.
 — v. Harper, 24 Miss. 517. §§8, 52.
 Workman v. Wright, 33 O. St. 405; s. c. 31 Am. Rep. 546. §119.
 Worley v. State, 7 Lea. 382. §§19, 48, 203.
 Wormley v. Wormley, 8 Wheat. 449. §§204, 206.
 Worthy v. Caddy, 76 N. C. 82. §204.
 Wragg v. Compt.-Gen., 2 Desaus (S. Car.), 509. §20.
 Wray v. Fedderke, 43 N. Y. Sup. Ct. 335. §258.
 Wrede v. Cloud, 52 Iowa, 371. §232.
 Wren v. Peel, 64 Tex. 374. §182.
 Wright v. Bates, 13 Vt. 341. §231.
 — v. Bundy, 11 Ind. 398. §§90, 210, 263.
 — v. Douglass, 10 Barb. 97. §§207, 212.
 — v. Duffield, 2 Baxt. (53 Tenn.), 218. §§106, 117.

- Wright v. Graham, 42 Ark. 141. §§30, 79, 97.
 — v. Hays, 10 Tex. 130. §118.
 — v. Lancaster, 48 Tex. 250. §147.
 — v. Lassiter, 71 Tex. 640. §§154, 234.
 — v. Player, 72 N. C. 94. §§68, 121.
 — v. Remington, 41 N. J. L. 48; s. c. 32 Am. Rep. 180. §108.
 — v. Solomon, 19 Cal. 64; s. c. 79 Am. Dec. 196. §247.
 — v. Wilson, 17 Mich. 192. §§70, 71, 74.
 — v. Wood, 23 Pa. St. 170. §236.
 — v. Wooters, 46 Tex. 383. §172.
 Wyatt v. Barwell, 19 Ves. 435. §§1, 17, 50, 165, 216.
 — v. Elam, 19 Ga. 335. §167.
 — v. Stewart. 34 Ala. 716. §198.
 Wylles v. Haun, 47 Iowa. 614. §77.
 Wyllie v. Pollen, 3 DeG. J. & S. 596; s. c. 32 L. J. Ch. 782. §240.
 Wynne, *In re*, Chase's Dec. 227. §213.

Y.

- Yancey v. Mauck, 15 Gratt. 300. §20.
 Yeatman v. Savings Institution, 95 U. S. 764. §§213, 254.
 Yeaton v. Fry, 5 Cranch, 535. §74.
 Yerger v. Young, 9 Yerg. 37. §4.
 Yoe v. Montgomery, 68 Tex. 338. §19.
 York v. McNutt, 16 Tex. 14; s. c. 67 Am. Dec. 607. §203.

- Yorty v. Paine, 62 Wis. 154. §84.
 Young v. Boardman, 97 Mo. 181. §62.
 — v. Bradley, 68 Ill. 553. §247.
 — v. Devries, 31 Gratt. 304. §42.
 — v. Duvall, 109 U. S. 573. §§69, 89, 90.
 — v. Guy, 87 N. Y. 457. §164.
 — v. Kellar, 94 Mo. 581; s. c. 4 Am. St. Rep. 405. §205.
 — v. Ringo, 1 Mon. 30. §56.
 — v. Shauer, 73 Iowa, 555; s. c. 5 Am. St. Rep. 701. §§169, 238.
 — v. Tarbell, 37 Me. 509. §172.
 — v. Thompson, 2 Kan. 83. §§31, 137, 138.
 — v. Young, 27 S. Car. 201. §126.
 Youngblood v. Vastine, 46 Mo. 239. §184.
 Younge v. Gilbeau, 3 Wall. 636. §144.
 Youngs v. Wilson, 27 N. Y. 351. §§31, 171.
 Youst v. Martin, 3 Serg. & R. 423. §14.

Z.

- Zimmerman v. Kinkle, 108 N. Y. 282. §210.
 Zimpleman v. Robb, 53 Tex. 274. §§114, 158, 182, 184, 186.
 Zollman v. Moore, 21 Gratt. 313. §35.
 Zorn v. Ry. Co., 5 S. Car. 90. §207.
 Zuchman v. Roberts, 109 Mass. 53; s. c. 12 Am. Rep. 598. §§247, 249.

INDEX.

[THE REFERENCES ARE TO THE SECTION NUMBERS.]

ABBREVIATIONS—

may be used by officer in stating his official title, 72.

ABANDONMENT OF WIFE—

authorizes her to convey without privy examination, when, 118.

ABSTRACT OF JUDGMENTS—

record of, required in some states, 42.

ABSTRACTS OF TITLE—

made evidence by statute in New Mexico, 422.

ACCIDENT OR MISTAKE—

in the release and cancellation of mortgages, 34, 175.
when relieved against in equity, 34, 175.

ACKNOWLEDGMENT—

ITS PURPOSE AND EFFECT, 52-56.

purpose of the acknowledgment, 52.

not necessary to record in what states, 53, 54.

necessary to title passing, when, 54.

as supplying proof of execution of the instrument, 56.

BY WHOM TO BE MADE, 57-60.

acknowledgment by a firm, 57.

by one of several grantors, 58.

by attorney in fact, 59.

by trustee, sheriff's deputy, *etc.*, 59.

or deeds by corporations, 60.

BEFORE WHOM TO BE MADE, 61-68.

officers named in the various statutes, 61.

deputies, magistrates, *etc.*, 62.

ex officio and *de facto* officers, 63, 64.

local jurisdiction of the officer, 65.

presumptions as to the officer's jurisdiction, 66.

disqualification by interest, 67.

by relationship, 68.

THE CERTIFICATE OF ACKNOWLEDGMENT, 69-86.

general requisite—must state the facts, 69.

caption and locality, 70.

must show official capacity, 71.

officer may use initials and abbreviations, 72.

official seal must be used, when, 73.

must be shown, how, 74.

double certificate of magistracy and conformity, 75, 377 note.

identity of grantor to be shown, when, 76.

the statutory words of identity, 77.

stating the grantor's name, 78, 57.

ACKNOWLEDGMENT—Continued.

- substantial compliance sufficient, 79.
- equivalent expressions may be used, 80.
- omission of material words, 82.
- clerical omissions and mistakes, 83.
- surplusage does not vitiate, 83.
- dating the certificate not material, 84.
- signature of the officer necessary, 85.
- certificate to be on same sheet with deed, when, 86.

WHEN AND OF WHAT THE CERTIFICATE IS CONCLUSIVE, 87-90.

- is by statute only *prima facie* evidence, where, 87.
- how far it should be conclusive, 88.
- may be impeached for fraud or forgery, 89.
- what evidence necessary to overcome the certificate, 90.

AMENDMENT OF CERTIFICATE, WHEN ALLOWED, 91-94.

- in case of married women, 93.
- correction of certificate by statute and in equity, 94.

VALIDATION AND MISCELLANEOUS MATTERS.

- acknowledgment of ancient deeds, 96.
- testimonios* and public acts of sale, 97, 359 note.
- validating statutes, 97.
- deeds of married women, 120.
- acknowledgment of chattel mortgages, 246.

ACKNOWLEDGMENT OF MARRIED WOMEN—**THEORY AND DISTINCTIVE FEATURES OF THE LAW, 98-102.**

- is statutory, and requisite to title passing, when, 98.
- distinctive features of her acknowledgment, 99.
- modern changes in the law, 100.
- the early and later theories of the law, 101.
- the modern view—not necessary to title, when, 102.

THE FOUR USUAL STATUTORY REQUISITES, 103-110.

- the separate examination, and how certified, 104, 105.
- the explanation of the deed, and how certified, 106, 107.
- the voluntary execution, and how certified, 108, 109.
- the continued assent, or wish not to retract, 110.

MATTERS RELATING TO THE CERTIFICATE, 111-115.

- substantial compliance sometimes sufficient, 111.
- joint certificate of husband and wife, 112.
- identity of the wife shown, how, 113.
- acknowledging deed of community property, 114.
- relinquishment of dower, 115.

AS AFFECTED BY WIFE'S DISABILITIES, 116-121.

- acknowledging deed with blanks therein, 116.
- wife may convey by power of attorney, when, 117.
- re-acknowledgment and ratification, 119.
- abandonment—wife as *feme sole*, 118.
- validating acknowledgment of the wife, 120.
- impeaching certificate of wife's acknowledgment, 121.
- because taken by telephone, p. 195.

ACTUAL NOTICE—**ORIGIN AND EXTENT OF THE DOCTRINE, 10, 165, 215-218.**

- actual notice supplies want of registry, 10.
- origin and prevalence of the doctrine, 215, 216.
- exceptions to the rule in various states, 217.
- exceptions as to certain kinds of instruments, 218.

THE SEVERAL KINDS AND DEGREES OF ACTUAL NOTICE, 219-222.

- actual notice and knowledge distinguished, 219.

ACTUAL NOTICE—Continued.

definitions of notice and actual notice, 220.
constructive, express and implied notice, 221.
statutory distinctions as to actual notice, 222.

THE DOCTRINES AS TO PUTTING ON INQUIRY, 223–227.

sources of the information, 224.
vague statements and rumors not notice, 225.
inquiry should be prosecuted, when and how, 226.
the presumption of notice is rebuttable, 227.

POSSESSION A SPECIES OF ACTUAL NOTICE, 228–237.

general rule that possession gives notice, 228.
exceptions to the rule in several states, 229.
grantor remaining in possession not notice, 230.
contra—such possession held to charge notice, 231.
possession will be referred to a title of record, 232.
 must be open and notorious, 233.
 must be actual, not constructive, 234.
joint possession not usually notice, 235.
 as notice of wife's title, 235.
possession by tenant, notice of landlord's title, 236.
 must be existing and continuous, 237.

NOTICE TO AGENT IS NOTICE TO PRINCIPAL, 238–244.

the general rule and its reason, 238.
scope of the rule—partners, trustees, officers, *etc.*, 239.
character of the agency—scope of employment, 240.
notice to be in same transaction, when, 241.
where agent acts for both parties, and for his own benefit, 242.
notice not imputed where agent guilty of fraud, 243.
notice to officers and agents of corporations, 244.

MISCELLANEOUS MATTERS.

actual notice as affecting creditors, 197, 270.
 of chattel mortgage, 269.
 to an execution purchaser, too late, when, 199, 200.
of release of mortgage, effectual, 175.
does not affect purchaser from a *bona fide* vendee, 155.
as supplying break in the record title, 159.
no difference in effect between actual and constructive notice, 153.
of claim of homestead exemption—when not effectual, 48.
of mechanic's lien—when effectual, 45, 46.
of a title imposes the duty of searching the records for mortgage
 of such title, 160.
of intention to execute deed, not effectual, 223 note.
is in time, when, 205.
of trust is effectual, 210 note.

AFFIDAVIT—

of *bona fides* sometimes requisite to mortgage, 30.
 especially chattel mortgages, 271.
of proof for record by witness, 128.
signature of witness not usually necessary, 128.
may be made "to the best of affiant's belief," 128.
to claim for mechanic's lien, 46, 47.
will not answer for acknowledgment of deed 83 note.

AFTER-ACQUIRED TITLE—

relates back so as to give the effect of notice to a prior record, 161.

AGENT. See Actual Notice.

notice to, is notice to principal, 238–244.

AGENT—Continued.

grantor as agent in filing the conveyance, 140, 144.
withdrawal of chattel mortgage by, 256.

ALABAMA—

statutory provisions relating to registry, 277–283.
acknowledgment not essential to record, 53.
priority of record not required of second deed, 14.
mortgages of growing crops, 273, 274.
acknowledgment or attestation essential to title passing, 283.

AMENDMENT—

of certificate of acknowledgment by officer, 92, 93.
of the record of an instrument by the recorder, 150.

ANTECEDENT DEBT—

not usually held to be “valuable consideration,” 207.
the rule does not obtain in some states, 207.
extension of time, *etc.*, is sufficient, 208.

ARIZONA TERRITORY—

statutory provisions relating to registry, 284–288.
community property, rights of wife, 114.

ARKANSAS—

statutory provisions relating to registry, 289–293.
certificate of acknowledgment, 52 note, 291.
actual notice of mortgage ineffectual, 217.
conveyances of wife's property, 186 note.

ASSIGNEE—

in bankruptcy not a purchaser, 211.
for benefit of creditors not a purchaser, 211.
held a purchaser in Virginia and Tennessee, 211 note.
of mortgage protected, how far, 33, 174.

ASSIGNMENT—

of mortgage held a “conveyance” within the recording acts, 33, 174.
contra—held not a conveyance, 33, 174.
now specified in many of the registry statutes, 33.
of choses in action not usually recordable, 245.

ATTACHMENTS—

levy of writs of, when and how recorded, 44.

ATTESTATION—

of witnesses necessary to the record, when, 145.
unacknowledged deeds without, are not good, where, 218, 54.

ATTORNEY. See Power of Attorney.

in fact—acknowledgment by, 59.
release of mortgage by, 175.
notice to, is not notice to client, when, 240, 241.
effect of a record showing one to be, 176.
chargeable with notice of legal defects, when, 224 note.
refusing to answer inquiry—effect of, 226 note.

B.**BILL OF SALE—**

- when recordable as chattel mortgage, 139 note, 255.
- how far within the registry statutes, 245, 246.
- of vessels, where to be recorded, 275.
- record essential, when, 189.

BLANKS—

- in wife's conveyance to be filled before acknowledgment, 116, 117 note.
- mistake in filling with wrong name, 78 note.

BONA FIDE PURCHASER—

- definition of, under the registry laws, 202.
- valuable consideration necessary, 204.
- must be without actual notice, 215.

BOND FOR TITLE—

- usually within the recording acts, 38.
- not so held in all instances, 38, 203 note.
- assignee of, takes subject to what equities, 203 note.

BOOKS OF RECORD—

- separate, required where and for what, 136.
- effect of record in wrong book, 136.
- recording mortgage in book of deeds, 137-139.

BREAK IN RECORD TITLE--

- effect of, as to notice, 158, 159.
- the rule in Louisiana, 158 note.

C.**CALIFORNIA—**

- statutory provisions relating to registry, 294-298.
- deeds of separate and community property as notice, 182 note, 177 note.
- wife's acknowledgment not necessary to deed of community property, 114.
- wife may convey by power of attorney, 117.
- antecedent debt held valuable consideration, 207.
- sheriff's acknowledgment not necessary to certificate of sale, 52 note.

CANCELLATION OF MORTGAGES—

- on the record—when and how made, 175.
- if wrongful, subsequent purchaser not protected, when, 175.

CERTAINTY—

- necessary in certificate of acknowledgment, 69-86.
 - of proof by witness, 128.
- in description of real estate, 147.
 - of personal property, 253.

CERTIFICATE. *See Acknowledgment.*

- of single acknowledgment, 69-86.
- of wife's acknowledgment, 98-121.
- necessary to wife's title passing, when, 101, 186.
- of sheriffs' sales, recordable, 169, 48.
 - and without acknowledgment in California, 52 note.
- of recorder—how far conclusive, 148, 272, 95 note, 47.
 - as to filing of chattel mortgage, 272.
- of magistracy and conformity, when required, 75, 377 note.

CHAIN OF TITLE—

- of record protects a purchaser, 154.
- record, notice only to claimants in same, 162.

CHATTEL MORTGAGES—

- general features as to record of, 41, 245.
- chattels real, fixtures, *etc.*, 252.
- description of the property, 253.
- filing and recording, 254.
- time within which to be filed, 255.
- filing and withdrawal, 256.
- re-filing, and when to be made, 257, 258.
 - excused by possession, 259.
- affidavit of renewal, 260.
- place of record—residence of mortgagor, 261.
 - in case of non-residents, 262.
 - non-resident corporation, 263.
 - in case of partnership, 264.
- removal of property, and re-record, 265.
 - to another state—comity, 266, 267.
 - lex situs* controls, when, 268.
- actual notice of, effectual, when, 269, 270.
- affidavit of good faith, 271.
- recorder's certificate of filing, 272.
- of growing crops, 273, 274.
- of ships and vessels, 275, 276.

CHOSER IN ACTION—

- transfer of not usually recordable, 245, 214, 177 note.

CLERICAL ERRORS—

- do not vitiate certificate of acknowledgment, 82.
- the transcribed record of a conveyance, 150.

COLORADO—

- statutory provisions relating to registry, 299-301.
- acknowledgment, not essential to record, 53.

COMITY OF STATES—

- how recognized in the recording acts, 11.
- in the enforcement of chattel mortgages, 266, 267.

COMMON LAW—

- registry unknown to, 1.
- appealed to in proof for record by witnesses, 122.
- rights of creditors at, 192.

COMMUNITY PROPERTY—

- system of, prevails in what states, 114.
- conveyance to wife presumed, when, 114, 177 note.
- recitals as notice of separate or, 182, 177 note.

CONDITIONAL SALE—

- purchaser from conditional vendee not protected, 249.
- contra*—is entitled to protection, 250.
- statutes requiring registr. of, 251.

CONNECTICUT—

- statutory provisions relating to registry, 302, 303.
- possession not of itself notice, 229, 302 note.
- record of deed not notice of mortgage, 139.
 - unacknowledged, notice of contract to convey, 302.

CONSIDERATION. *See Valuable Consideration.*

what is sufficient under the recording acts, 204.

what is not sufficient, 206, 207.

CONSTRUCTIVE NOTICE—

afforded by registry is conclusive, 4, 152.

except as to recitals putting on inquiry, 178-183.

extent to which the record is, 176, 177.

definitions of, 221 note.

as distinguished from actual, 220, 221.

CONTRACTS. *See Executory Contracts.*

not always within the registry acts, 37.

example of, within the registry statute, 203 note.

CONVEYANCES. *See Deeds, etc.*

held to include assignment of mortgage, 33, 174.

statutory definitions of, 284, 294, 329.

COPY—

of an instrument not recordable without aid of the statute, 56.

certified copy conclusive to what extent, 148, 272.

of chattel mortgage may be filed, 257.

CORPORATIONS—

deeds of, how acknowledged, 60.

statutory provisions on the subject, 420.

notice to agent of, is binding, 244.

to stockholders and directors, 244.

chattel mortgages by, 263.

COUNTY—

deeds usually recordable in what, 134.

unorganized—place of record, 134; also see note on p. 16.

chattel mortgages, 261-263.

CREDITORS—

rights of at common law, 192.

how affected by actual notice, 218, 197.

are purchasers, when, 194-196.

pre-existing debt as valuable consideration, 207.

usually only lien creditors protected, 196.

statutory provisions and their diversity, 10, 193.

what creditors are protected, 194.

fully protected in Virginia and some other states, 218, 195.

subsequent and prior creditors, 194.

as affected by unfiled chattel mortgage, 270, 218.

of estate, with probated claim, a lien creditor, 196 note.

CROPS—

growing and to be grown—record of chattel mortgages of, 273.

how described in the mortgage, 274.

lien of, not good against purchaser, when, 274.

CUSTOM—

as determining the book of record, 137, 188.

as authorizing proof by witnesses, 122.

D.**DAKOTA—**

statutory provisions relating to registry, 304-308.

community and separate property of wife, 114, 185.

(48—Reg. of Title.)

DATE—

not usually essential to certificate of acknowledgment, 84.
where dates are conflicting, 84.
delivery presumed at, when, 144.

DECREE. See Judgment.

as affecting holder of an unrecorded deed not a party to the suit, 191.
as a link in chain of title, 162 note.
abstract of, to be recorded, when, 42.
setting aside joint deed because of defective acknowledgment of wife, 121 note.

DEDICATION—

of streets to public by recorded plat, 49.

DEEDS. See Quit-claim; Trust Deed.

English statute requiring enrollment of, 1.
sheriffs' deeds requiring acknowledgment, 26, 54.
quit-claim, as notice of imperfect title, 27, 183.
what statutory requisites essential to the record of, 142, 144-147.
deed absolute as mortgage, 137-139.
deed of trust usually treated as mortgage, 35, 210, 175 note.
surrender and cancellation of, revests title, when, 189 note.

DEFEASANCE. See Mortgages.

statutes requiring record of, 32.
effect of want of record of, 32, 137-139.

DEFINITIONS—

of notice, actual and constructive, 219-221 and notes.
of *bona fide* purchaser, 202.
of valuable consideration, 204.
statutory definitions of "conveyance," 284, 294, 329.

DELAWARE—

statutory provisions relating to registry, 309-311.
what creditors protected by recording acts, 10, 309, 193.
corporation deeds acknowledged, how, 311.

DELIVERY—

of deed essential to valid record, 144, 154.
recording when a delivery, 144.
presumed at what date, 144.
for a simultaneous, see 168 note.

DESCRIPTION—

of real estate in deed, 147.
of property in chattel mortgage, 253, 273.

DEPUTY—

may take acknowledgment, when, 62.
acknowledgment by, how made, 59.

DILIGENCE—

requisite where one is put on inquiry, 226.
in obtaining prior record, 216 note.

DISCHARGE OF MORTGAGE. See Mortgage.

statutes and decisions relating to, 34, 175.

DISTRICT OF COLUMBIA—

statutory provisions relating to registry, 312-316.
wife must join in mortgage of exempt property, 313.

DOWER—

relinquishments of, by wife, 115.

DURESS—

certificate of wife's acknowledgment when impeachable for, 121, 88, 89.

E.**EASEMENT—**

conveyance of, within recording acts, 48.
user as notice of, 233 note.

EFFECT OF RECORD—

in the United States the record imparts absolute notice, 4, 152.
and the notice is conclusive, 152.
record protects a *bona fide* purchaser, 154.
subsequent record of a prior deed charges notice, when, 156.
not notice to prior parties, 163, 164.
priority in registration, 165-170.
extent to which the record is notice, 176-183, 153 note.
destroyed, second recording not necessary, 187.
as giving validity to the instrument, 189.
as notice "to all the world," 21, 22.
record of deed of trust with power of sale is notice of sale, 35.
made operative by subsequent matters, when, 190.
record necessary in Texas to extend possession to boundaries in deed, 234 note.

ENGLISH LAW—

statute of enrollments, 1.
record not constructive notice, 2.
registry system limited, 2.
possession by tenant as notice, 236.

EQUITABLE TITLES—

usually within the registry laws, 19, 36, 39.
the earlier decisions, 36, 203.
the rule not universal, 36, 203.

EQUITY—

will not enforce or reform wife's defective acknowledgment, 94.
will afford relief against wrongful discharge of mortgage, when and how, 175.
relief in cases of part payment before notice, 206.
in cases of substituted and prior recorded liens, 171.

ESTOPPEL—

enures to benefit of grantee in the first deed, 161.
acknowledgment estops grantor to deny his signature, 52 note.
by refusal to give information, 226.
by silence as to prior mortgage, 226 note.
grantor in possession estopped by his deed, 230.

EVIDENCE—

parol, when admissible to impeach certificate of acknowledgment, 87-89.
amount of, necessary to overcome the certificate, 90, 121.
what is, to charge notice and put on inquiry, 221-223.
whether admissible to vary certificate of record, 148, 272.
not admissible to show officer's authority to take acknowledgment, 71.

EXECUTION PURCHASER—

when protected by the recording acts, 199.
when notice to, is effectual, 200.

EXECUTORY CONTRACTS—

are now usually within the registry acts, 37, 19.
must in some way be specified, and are not embraced by "conveyances" and "deeds," 37, 352.

EXPRESS NOTICE—

a degree of actual notice, 219-221.

F.**FEEs—**

payment of recorder's, not essential to notice, 151.

FEME SOLE. See Married Woman.

wife may convey as, when, 118.

FILING—

given the full effect of notice, when, 16, 140.
filing and withdrawal not notice, 140, 256.
of chattel mortgages, 254.

FIXTURES—

chattel mortgages of, how recorded, 252.

FLORIDA—

statutory provisions relating to registry, 317-321.
proof of execution of deed must show its delivery, 321 note.

FORGED DEED—

record of, not notice, 154 note.

FRAUD—

record is not constructive notice of fraud against creditors, 176 note.
effect of fraudulent release of mortgage, 175.
when certificate of acknowledgment impeachable for, 89, 90, 121.

FUTURE ADVANCES—

mortgages for—record effectual to what extent, 170 note, 164, 171 note.

G.**GEORGIA—**

statutory provisions relating to registry, 322-328.
priority in record of deeds and mortgages, 167, 323.
conveyances attested for record, how, 52.
mortgages void for usury, by statute, 154 note.
purchase money mortgages—priority of, 172 note.
record of title to personal property, 328.
creditors as affected by the recording acts, 192 note, 194,

GOOD FAITH. See Actual Notice.

purchase not in, not protected, 215.
what is necessary to, 202.
as an element of "purchaser for valuable consideration," 201.
as defined in Massachusetts, 201 note.
as applied to creditors, 218, 194, 200.

GRANTOR AND GRANTEE. *See Acknowledgment.*
stating grantor's name in the certificate, 78.
omission of names from blanks, 81, 82, 112 note.
from the transcribed record, 82.

GROWING CROPS—

chattel mortgages of—record notice, when, 273, 274.

H.

HANDWRITING. *See Witnesses.*

deed recordable on proof of, when, 130.

HEIR—

purchaser from, protected against unrecorded deed of ancestor,
184, 158.

HOMESTEAD—

statutory record in conveyances of, 48.

HUSBAND AND WIFE. *See Married Woman.*

joint certificate of acknowledgment by, 112.

joint conveyances of wife's property, 186.

community property of, 114.

notice to husband is notice to wife, when, 239.

I.

IDAHO TERRITORY—

statutory provisions relating to registry, 329-333.

acknowledgment of deeds by corporations and agents, 331.

IDENTITY—

of grantor to be shown in certificate of acknowledgment, when, 76.

how made to appear in the certificate, 77.

of wife, how shown, 113.

ILLINOIS—

statutory provisions relating to registry, 334-337.

acknowledgment of chattel mortgages, 246.

purchaser from conditional vendee protected, 250.

INDEX—

not usually essential to the record, 142.

special statutory index in some states, 143, 343.

indexing necessary to notice, when, 142, 143, 343.

of judgment satisfaction charges what notice, 175 note.

INDIANA—

statutory provisions relating to registry, 338-342.

chattel mortgages to be recorded within ten days, 255, 342.

INFORMATION. *See Putting on Inquiry.*

source and certainty of, 224.

INNOCENT PURCHASER. *See Bona Fide Purchaser.*

how defined, 202.

INQUIRY. *See Actual Notice.*

when and how to be prosecuted, 223-226.

what is sufficient to put upon, 223-225, 181 note.

INTEREST—

mortgage to show rate of, 171.
usury as rendering mortgage void, 154 note.

INTERPRETER—

officer may use, to explain deed, *etc.*, 57.

IOWA—

statutory provisions relating to registry, 343-346.
noting in index and transfer book essential to record, 343, 143.

J.

JOINT PURCHASERS—

notice to one is notice to the others, when, 239.

JOINT TENANTS—

possession by, as notice, 235, 236.

JUDGMENT—

purchaser under, chargeable with notice of invalidity of, 212 note.
abstract of, to be recorded, when, 42.
as a link in chain of title, 162 note.
when reversal of, destroys sale made under, 191 note.
as affecting an unrecorded deed, 191.
on an acknowledgment, how affected by subsequent validating statute, 97.

JUDGMENT CREDITOR. *See Creditor.*

where protected by the registry acts, 196.
how and to what extent protected, 197-200.

K.

KANSAS—

statutory provisions relating to registry, 347-351.
law as to acknowledgment, 52.
actual notice of chattel mortgage does not affect creditors, 270, 357.
of deed, what sufficient, 222.

KENTUCKY—

statutory provisions relating to registry, 352-356.
married woman's power of attorney, 117, 354 note.
bond for title held not recordable, 38.

KNOWLEDGE. *See Actual Notice.*

statutes requiring actual knowledge, 222.
possession must be known, when, 229.
what sufficient to put on inquiry, 216, 223-226.
of agent charges principal, when, 240-244.
one with knowledge of fraud takes subject, 89, 121.

L.

LEASE—

as affected by the recording acts, 28.

LEX SITUS—

controls as to acknowledgment, 11.
as to chattel mortgage, when, 268.

LIENS. *See Mortgages.*

record of attachment and execution, 44.

mechanic's liens, 45, 46.

priority in record of, 169.

priority as between judgment and mortgage in Texas, 169.

of judgment attaches though deed to debtor not recorded, 192 note.

LIS PENDENS—

record of notices of, 43.

LOUISIANA—

statutory provisions relating to registry, 357-360.

acknowledgment not essential to record, 52 note.

actual notice of no effect, 217.

record of privileges, 360.

of mortgages, 358.

deed of trust will not answer for a mortgage, 210.

mortgage of realty embraces, what, 154 note.

re-inscription of mortgages, 173.

M.**MAINE—**

statutory provisions relating to registry, 361-364.

how far possession is notice, 229, 361 note.

the law as to actual notice, 222.

MANNER OF RECORD—

various details relating to, 150.

copying seal, signing the record, *etc.*, 150.

MAPS—

law relating to record of, 49, 149 note

dedication by record of town-plat, 49

MARITIME LIEN—

not required to be recorded, 275, 276.

MARK—

sufficient signature in proof of handwriting, 130.

MARRIAGE—

is deemed valuable consideration, 204.

MARRIED WOMAN. *See Acknowledgment by; Wife.*

acknowledgment by—conflict of statutes, 8.

the law relating to her conveyances, 98-102.

acknowledgment of her deeds, 103-110.

her disabilities as affecting her conveyances, 116-125.

joinder of husband necessary, when, 186.

registry of her separate property, 185.

joint possession with husband as notice, 235.

as affected by notice to the husband, 239.

validating deeds of, 120.

impeaching certificate of her acknowledgment, 121.

deed by, alone. charges notice, when, 158 note.

deed to, whether separate or community property, 114, 177 note.

MARYLAND—

statutory provisions relating to registry, 370-374.

purchaser from conditional vendee protected, 250.

mortgages require affidavit of *bona fides*, 365, 369, 271.

creditors as affected by the recording acts, 194 note.

MASSACHUSETTS—

statutory provisions relating to registry, 375-378.
the law of actual notice, 222.
possession as affording notice, 229.

MECHANICS' LIENS—

law relating to registry of, 45, 46.

MICHIGAN—

statutory provisions relating to registry, 375-379.
wills required to be recorded, 376 note.

MINNESOTA—

statutory provisions relating to registry, 380-384.
priority of purchase money mortgage, 172.
"purchaser" defined by statute, 380.

MISSISSIPPI—

statutory provisions relating to registry, 385-389.
acknowledgment of deed must show its delivery, 387 note.
purchaser at execution sale protected, when, 212 note, 195 note.
possession of grantor not notice, 230 note.

MISSOURI—

statutory provisions relating to registry, 390-395.
actual notice of chattel mortgage unavailing, 269.
sheriffs' deeds not valid without acknowledgment, 54, 392 note.
law as to actual notice, 222.

MISTAKE—

of grantor's name in certificate of acknowledgment, 78 note.
in record discharge of mortgage, 175.
in copying deed or mortgage into the record, 16-18, 171.
what notice is imparted by erroneous record, 16-18.
subsequent purchaser without notice not affected by, 154.

MONTANA TERRITORY—

statutory provisions relating to registry, 396-400.

MORTGAGE—

conveys legal title in what states, 24.
general features relating to registry of, 30.
record of deed absolute is notice of, 139.
contra—is not effectual as notice, 137, 138.
priority in the record of, 170, 166.
simultaneous—rule as to priority, 170.
delay in recording, not prejudicial, when, 171.
rate of interest to be shown, as against subsequent lien, 171.
loss of priority of record not relieved in equity, 171.
doctrine of tacking not applied, 171.
priority of purchase money mortgages, 172, 223 note.
record of mortgage before deed to mortgagor, 160, 161, 223 note.
re-inscription of mortgages in Louisiana, 173.
to secure future advances—lien to what extent, 164, 170 note, 171 note.
release of part of property, without payment, after notice of a subsequent mortgage, 171 note.
agreement for extension to be recorded, when, 171 note.
must state the amount of indebtedness secured, 171 note.
by ancestor, though unrecorded, good over judgment against heir, 171 note.
transfer of negotiable note carries mortgage, 204 note.

MORTGAGE—Continued.

- substituted, loses priority of record, when, 171 note, 169 note.
- assignment of, to be recorded, when, 33, 174, 209.
 - failure to record does not cause a merger because of re-conveyance, 174 note.
- discharges and releases of, by record, 175.
 - failure to record—subsequent purchaser protected, 175 note.
- release not good against holder of the note, 175 note.
- actual notice of release sufficient, 175.
- mortgagee a purchaser, 209.
- purchaser under, with notice, protected, when, 199 note.

N.

NAME—

- stating grantor's, in certificate of acknowledgment, 78.
- mistake in filling blank with wrong, 78 note.
- identity of, *prima facie* sufficient, 78 note.

NEBRASKA—

- statutory provisions relating to registry, 401-405.
- creditors as affected by the registry acts, 192 note.
- wills required to be recorded, 401.
- lien of judgment has priority, when, 169.

NEVADA—

- statutory provisions relating to registry, 406-410.

NEW HAMPSHIRE—

- statutory provisions relating to registry, 411-415.

NEW JERSEY—

- statutory provisions relating to registry, 416-421.

NEW MEXICO—

- statutory provisions relating to registry, 422-426.

NEW YORK—

- statutory provisions relating to registry, 427-431.
- actual notice of deed unacknowledged and unattested is ineffectual, 218.
- as to record of executory contracts, 37.
- record of deed absolute not notice of mortgage, 138.

NORTH CAROLINA—

- statutory provisions relating to registry, 432-436.
- actual notice of mortgage ineffectual, 217.
- law pertaining to deeds and mortgages, 217.
- making tar on land as possession of it, 233 note.

NOTARY PUBLIC—

- authorized to take acknowledgments, when and where, 61.
- use of notarial seal by, 73.

- NOTICE. *See Actual Notice; Effect of Record.*

- definitions of, 220 note.
- different kinds and degrees of, 219-221.
- record is constructive, 152.
- the law of actual notice, 215-244.
- notice to creditors, 197, 270.
 - to purchasers, 199-202.
- "to all the world"—limitations, 21, 22.

O.

OFFICERS—

- authorized to take acknowledgments, 61.
- official capacity to be stated, 71, 72.
- double certificate necessary, when, 75.
- recorders and clerks, 148.
- their liability for damages, 148.
- of corporations—notice to, 244.

OHIO—

- statutory provisions relating to registry, 437-442.
- actual notice of mortgage ineffectual, 217.
- record of deed absolute as mortgage, 138.
- knowledge of unrecorded deed—what is, 222.

OREGON—

- statutory provisions relating to registry, 443-447.
- creditors as affected by the recording acts, 192 note.

P.

PAROL EVIDENCE. *See Evidence.*

- admissible to impeach certificate of acknowledgment, when, 87-89.
- amount necessary to overcome the certificate, 90, 121.

PARTITION—

- by parol, exempt from the recording acts, 48 note.

PARTNER—

- notice to, is notice to the firm, 239.
- notice of partnership has what effect, 224 note.
- chattel mortgage by—place of record, 264.

PART PAYMENT—

- is sufficient consideration, when, 206, 205.
- relief afforded *pro tanto*, 206.

PATENTS—

- when required to be recorded, 25.
- recitals in, as charging notice, 177.

PENNSYLVANIA—

- statutory provisions relating to registry, 449-453.
- record of deed absolute not notice of mortgage, 138.
- purchaser from conditional vendee protected, 250.

PERSONAL PROPERTY. *See Chattel Mortgages.*

- general features of the law of record, 40.
- general principles of registry apply to, 245.
- what embraced within the recording acts, 40, 245.
- the rule of construction as to, 245.
- statutory distinctions, 246.
- possession of, as evidence of title, 247.
- does not protect purchaser, 247, 248.
- conditional sales of—law of record as to, 249-251.
- removal of, and *lex situs*, 265-268.
- chattel mortgages—law of record, 252-274.
- mortgages of ships and vessels, 275, 276.

PLACE OF RECORD—

- in county where the land lies, 134.
- in what offices—general land office, 135.
- as to chattel mortgages, 261-265.
- of deed of assignment in New York, 211 note.

PLATS—

- of towns and cities—law of record, 49.
- dedication of streets and lots by record of plat, 49.

POWER OF ATTORNEY—

- usually within the recording acts, 29.
- when and where to be recorded, 29.
- of wife, not valid, when, 117.
- revocations of, to be recorded, 29.
- to assign and discharge mortgage, held not recordable, 209 note.

POSSESSION—

- is notice—reason of the rule, 228.
- exceptions to the rule, 229.
- must be known to subsequent purchaser, when, 229, 222.
- by grantor, after deed made, not notice, 230.
 - contra*—held notice, 231.
- will be referred to a title of record, 232.
- must be open and notorious, 233.
- must be actual—character of defined, 234, 233.
- under junior title, must be actual, how far, 234 note.
- joint, not notice, when, 235.
 - by husband and wife, tenants in common, 235, 232.
- by tenant is notice of landlord's title, 236.
 - not notice to landlord of adverse claim, 236.
- must be existing and continuous—vacant premises, 237.
- under statutes of limitation, 234.
- by mortgagee, notice to what extent, 232.
- under written instrument, extends how far, 234.

PRESUMPTION—

- in favor of officer's jurisdiction, 66.
 - of ancient deeds and acknowledgments, 95.
- of notice from facts putting on inquiry is rebuttable, 153, 227.

PRINCIPAL AND AGENT. *See Agent.*

- notice to principal is notice to agent, 238.
- application and limitations of the rule, 239-244.
- acknowledgment of deed by agent, 59.
- where agent is guilty of fraud, 243.
- where agent acts for both parties, 242.
- notice to be in same transaction, when, 241.

PRIORITY—

- of record gives priority of right under same statutes, 13, 166.
- the rule where not determined by statute, 14, 166.
- the reason and equity of the matter, 13-16, 165-168.
- in the record of liens, 169.
 - of purchase money mortgages, 172.
 - of mortgages in general, 170, 171.
- in conveyances and records of same date, 169.
- simultaneous conveyance is not a subsequent one, 167, 170.

PRIVILEGES—

- record of, in Louisiana, 360.

PROBATE—

of deeds for acknowledgment in North Carolina, 69.

PROMISSORY NOTE—

giving, constitutes payment, when, 205.

holder of, secured by mortgage, protected against release of the mortgage, 175.

with vendor's lien, may be recorded, 48 note, 360 note.

transfer of, carries mortgage, when, 204 note.

PUBLIC POLICY—

registry laws conducive to, 19.

PURCHASER. See Subsequent Purchaser.

protected by the recording acts, when, 199-214.

PUTTING ON INQUIRY. See Actual Notice.

charges with notice, when, 223, 219.

what is sufficient and not, 224, 225.

inquiry to be prosecuted, and how far, 226, 227.

recitals in title papers as, 178-181, 221 note.

Q.

QUIT-CLAIM—

gives notice of imperfect title, 27, 183.

contra—purchaser by, protected, 27, 183.

R.

RATIFICATION—

by wife, of deed with defective acknowledgment, 119.

of acts of agent by principal, 242 note.

RECITALS—

of purchase money paid, sufficient, when, 204.

to other instruments charge notice, 181.

as supplying gap in recorded title, 159, 160 note.

to matters of fact put on inquiry, 182.

general rules as to recitals, 178.

in same chain of title charge notice, 221, 181 note, 178.

unusual and imperfect recitals, 179, 180, 174.

RECORDER. See Certificate.

waives payment of fees in advance by filing conveyance, 151.

duties and liabilities of, 148.

should correct the record by recording anew, 191 note.

RECORDED TITLE—

protects a purchaser, when, 154.

when it does not protect, 154, 156.

RE-FILING. See Chattel Mortgage.

of chattel mortgages, 257-259.

excused by possession being taken, 259.

REGISTRATION—

the English system, 1, 2.

the American theory and system, 3, 4, 152.

extension of the system of, 19, 36, 39.

RESIDENCE. *See Chattel Mortgage; Corporation.*

of mortgagors as place of record, 261-264.

of owner of ship at home port, 275.

RESULTING TRUST—

not within operation of the registry laws, 19, 20.

when purchaser not protected against, 200.

REVOCATION—

of power of attorney to be recorded, when, 29.

RHODE ISLAND—

statutory provisions relating to registry, 455-459.

RIGHT-OF-WAY—

grant of, to be recorded, 48.

user as giving notice of, 233 note.

RUMORS—

not sufficient to charge notice, 225.

S.**SALE.** *See Conditional Sale; Bill of Sale.*

of personal property not usually to be recorded, 40, 245.

of mortgaged crop—vendee protected, when, 274.

SATISFACTION. *See Mortgage.*

rules as to record entry of, 34, 175.

SCHEDULE—

to be recorded with deed or mortgage, 149.

SCROLL—

will usually suffice for private seal, 146.

SEAL—

official. to be used by officer, when, 73.

how referred to in the certificate, 74.

how made to appear on the record, 74, 150.

SEPARATE PROPERTY. *See Community Property.*

what recitals charge notice of, 114, 182 note, 177 note.

SHERIFFS' DEEDS—

acknowledgment necessary to validity, where, 26, 54.

certificates of sale—record of, 26, 54.

vendee in, protected, when, 199, 200.

record of no avail, when, 157 note.

SHIPS—

registry of bills of sale and mortgages of, 275, 276.

SIGNATURE—

of officer necessary to his certificate, 85.

of recorder not necessary to record, 150.

record of deed without, 146.

SOUTH CAROLINA—

statutory provisions relating to registry, 460-464.

rights of creditors under the registry acts, 194.

STATE—

protected as a "purchaser," 200 note.

STATUTES—

conflict of, as to registry among the several states, 5.
summary of state, relating to registry, 277-506.
registry dependent entirely upon, 23.
the early English statute quoted, 1.
where permissive—effect of non-registry, 188 note, 40.

STOCKHOLDER—

notice to, not notice to corporation, 244.

STREETS—

dedication by recorded plat, 49.

SUBSEQUENT PURCHASER. *See Purchaser.*

protected by the registry acts, 198-211, 154.
may purchase with actual notice, when, 199, 200, 155.
must be *bona fide*, 201, 202.
at execution and bankrupt sales, 212, 213.
of same property from same grantor, 214.
at mortgage sale, with notice, protected, when, 199 note.

SURETY—

not entitled to subrogation as against a subsequent mortgage,
when, 176 note.
payment of note by, is valuable consideration, 205 note.

T.

TACKING—

doctrine of, not applicable under the registry acts, 171.

TAX DEED—record of, not notice of what, 177 note.

holder of unrecorded, not affected by suit, when, 191.

TELEPHONE—acknowledgment taken by, valid, p. 195.

TENANT—

possession by, is notice of landlord's title, 236.
and of the tenant's right in the premises, 236.

TENANT IN COMMON—

possession by, notice, how far.
where one is affected with actual notice, 155 note.

TENNESSEE—

statutory provisions relating to registry, 465-470.
creditors as protected by the recording acts, 194, 214, 196.
conveyance by wife of her separate property, 186 note.

TESTIMONIOS—

authentication and record of, 97.

TEXAS—

statutory provisions relating to registry, 471-476.
wife may convey by power of attorney, 117.
community and separate property deeds, 114.
actual notice does not affect creditors of chattel mortgagor, 270.
registry of wife's separate property, 185.
possession under statutes of, 234 note.

TIME—

recording may be done at any time, 131.
statutory time within which record may be made with right of
priority, 7, 132.
effect of record within and after the, 133, 167.

TIME.—Continued.

chattel mortgages to be filed within what, 255.
time when actual notice given will be effectual, 205.
extension of, as valuable consideration, 208.

TITLE—

does not pass without acknowledgment, when, 54.
without record, when, 189.

TRUST. See Trustee; Resulting Trust.

actual notice of, is binding, 210 note.

TRUSTEE—

is alone authorized to release trust deed, when, 176 note.
is regarded as a purchaser, when, 210, 35.
for benefit of creditors, not a purchaser, 210, 211.
notice to, is notice to *cestui que trust*, when, 239.
cannot take acknowledgment of deed of trust to himself, 35, 67.

TRUST DEED—

usually regarded as a form of mortgage, 35, 210, 175 note.
rule not universal, 35, 358 note.
release of, when not effectual, 175 note.
not assignable like a mortgage, 210 note.

U.**USAGE—**

recognized as determining the proper book of record, 37, 188.
and as to proof for record by witnesses, 122.

USURY—

mortgage invalidated by, in Alabama and Georgia, 154 note, 209.

UTAH TERRITORY—

statutory provisions relating to registry, 477-480.
possession by polygamous wife not notice, when, 235 note.

V.**VALIDATING STATUTES—**

a frequent exercise of legislative power, 23.
constitutionality of such statutes, 23, 97.
of defective acknowledgments, 97, 190 note.
of deeds of married women, 120.
of defective records, 190.
as affecting two adverse deeds of same property, 168 note.
as affecting sheriffs' deeds, 26.

VALUABLE CONSIDERATION—

defined, under the registry acts, 204, 205, 206.
antecedent debt as, 207.
extension of time as, 208.

VENDOR'S LIEN—

how far exempted from the operation of the registry laws, 20.
implied, now abolished in many states, 20.
prohibited by general policy of registry acts, 20, 200 note.

VENUE—

statement of in certificate of acknowledgment, 70.

VERMONT—

statutory provisions relating to registry, 481-484.

VESSELS—

bills of sale and mortgages of, to be registered, where, 275.
state and Federal legislation on the subject, 276.

VIRGINIA—

statutes relating to registry, 485-488.
creditors protected to what extent, 193, 196, 197, 211 note.
deed of married woman not effectual until recorded, 186.
antecedent debt is valuable consideration, 207, 211 note.

VOID DEED—

record of, is not notice, 154 note.

W.

WARRANTY—

where deed is with, after-acquired title enures to benefit of first
recorded conveyance, 161.

WASHINGTON TERRITORY—

statutory provisions relating to registry, 489-493.
registry of wife's separate property, 185.

WEST VIRGINIA—

statutory provisions relating to registry, 494-498.
creditors as protected by the recording acts, 196.

.. WIDOW—

ratification by, of deed defectively acknowledged as wife, 119.

WIFE. *See Married Woman.*

acknowledgment of deeds by, 103-110.
conveyances by and to, 116-125, 186.

WILLS—

laws relating to the record of, 50.
recorded as conveyances in some states, 51.

WISCONSIN—

statutory provisions relating to registry, 499-503.

WITHDRAWAL—

of deed after filing—effect of, 140, 256.
of chattel mortgage, 254.

WITNESSES—

proof for record by, as at common law, 122.
general features of the statutes, 123.
summary of statutory provisions, 124.
are of grantor's selection, when, 125.
proof by one when statute requires two, 126.
to deed, not chargeable with notice of it long afterwards, 223
note.
defined—when disqualified, 127,
the certificate and affidavit of proof by, 128.
other statutory matters as to proof by, 129.
proof of handwriting, 130.
subscribing, essential to record, when, 145.
statutory certificates of proof by, 321, 326, 341, 345, 350.

WYOMING TERRITORY—

statutory provisions relating to registry, 504-507.

